(13)

No. 93-1462-CFH
Status: GRANTED

Title: California Department of Corrections, et al., Petitioners
v.
Jose Ramon Morales

Docketed:
March 7, 1994

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Ching,James

Counsel for respondent: Asperger,James R.

40 copies ea ptn & sep appdx. 40 copies ptn & appendix rcd 3-7-94, 39 cps appdx returned 3-9-94, corr cps appdx rcd 3-17-94.

Entry	Date	Note	Proceedings and Orders
1	Mar 4 1994	G	Application (A93-719) for a stay of mandate pending filing and disposition of petition for certiorari, submitted to Justice O'Connor.
2	Mar 7 1994		Response to application (A93-719) from Jose Ramon Morales requested by Justice O'Connor, due March 18, 1994.
3	Mar 7 1994		Application (A93-719) granted by Justice O'Connor. It is ordered that the mandate of the United States Court of Appeals for the Ninth Circuit, case No. 92-56262 is hereby stayed pending receipt of a response due on or before March 18, 1994 and further order of the undersigned or of the Court
4	Mar 7 1994	G	Petition for writ of certiorari filed.
5	Mar 7 1994		Appendix of petitioner filed.
6	Mar 19 1994		(A93-719) Temporary stay heretofore issued by Justice O'Connor on March 7, 1994, is vacated. Application for stay is denied.
7	Apr 20 1994		DISTRIBUTED. May 13, 1994 (Page 2)
8	May 10 1994	P	Response requested -- AS. (Due June 10, 1994)
12	Jun 3 1994		Brief of respondent Jose Ramon Morales in opposition filed.
13	Jun 3 1994	G	Motion of respondent for appointment of counsel filed.
9	Jun 15 1994		REDISTRIBUTED. September 26, 1994 (Page 1)
10	Sep 21 1994	G	Application (A94-204) for a stay of relief issued by CA9 February 9, 1994, submitted to Justice O'Connor.
11	Sep 26 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. Rule 29.2 does not apply.
			**********
14	Sep 29 1994		Application (A94-204) referred to the Court by Justice O'Connor.
15	Sep 30 1994		Application (A94-204) granted by the Court.

No. 93-1462-CFH

Entry	Date	Note	Proceedings and Orders
16	Oct 3 1994		DISTRIBUTED. October 7, 1994 (Page 28)
17	Oct 11 1994		Motion for appointment of counsel GRANTED and it is ordered that James R. Asperger, Esquire, of Los Angeles, California, is appointed to serve as counsel for the respondent in this case.
18	Oct 28 1994		Joint appendix filed.
19	Oct 28 1994		Brief of petitioners California Department of Corrections, et al. filed.
20	Nov 7 1994		Brief amicus curiae of Criminal Justice Legal Foundation filed.
23	Nov 7 1994		Record filed.
		*	Original record proceedings United States District Court for the Central District of California.
21	Nov 8 1994		Brief amicus curiae of Georgia filed.
22	Nov 8 1994		Brief amici curiae of Pennsylvania, et al. filed.
26	Nov 8 1994		Brief amici curiae of Pacific Legal Foundation, et al. filed.
24	Nov 14 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
25	Nov 14 1994		SET FOR ARGUMENT MONDAY, JANUARY 9, 1995. (3RD CASE).
27	Nov 18 1994		CIRCULATED.
28	Dec 6 1994	X	Brief of respondent Jose Ramon Morales filed.
29	Dec 6 1994	X	Brief amici curiae of National Legal Aid and Defender Association, et al. filed.
31	Dec 19 1994	D	Motion of petitioners to strike the amici curiae brief of National Legal Aid and Defender Association, et al. filed.
30	Dec 20 1994	X	Reply brief of petitioners filed.
32	Dec 28 1994		Response of National Legal Aid and Defender Assn, et al. to motion to strike brief as amici curiae filed.
33	Jan 3 1995		DISTRIBUTED. January 6, 1995
34	Jan 9 1995		Motion of petitioners to strike the amici curiae brief of National Legal Aid and Defender Association, et al. DENIED.
35	Jan 9 1995		ARGUED.

(1)

NO. 931462 MAR 7 1994

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Petitioners

v.

JOSE RAMON MORALES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws contained in Article I, section 9, clause 3 and Article I, section 10 of the U.S. Constitution?

This issue is identical to that presented in Cavanaugh v. Roller, No. 92-1510, cert. granted, __U.S.__, 113 S.Ct. 2412, cert. dismissed as improvidently granted, ___U.S.__ 114 S.Ct. 593. The underlying case in No. 92-1510 is Roller v. Cavanaugh, 984 F.2d 120 (4th Cir. 1993).

LIST OF PARTIES

Petitioners are the California Department of Corrections, a state department which administers state prisons and other correctional programs; the Attorney General of the State of California, a California constitutional officer who is the chief law enforcement officer of the state; the California Board of Prison Terms, a state board which determines the terms, conditions, and dates of parole for adult state prisoners; and E.R. Meyers, the warden of the institution where respondent was incarcerated at the time respondent filed the underlying petition for a writ of habeas corpus.

Respondent is a state prisoner who has been convicted of murder in 1971 and 1980.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Petitioners

v.

JOSE RAMON MORALES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners California Department of Corrections, et al., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 9, 1994. That opinion deals with the circumstances under which a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws. In particular, this case involves a federal question of great importance, the nature and quality and burden of proof required to make a showing of detrimental impact as to an ex post facto claim. S.Ct. Rule 10.1(a), 10.1(c).

In addition, the instant case involves a legal issue

In addition, the instant case involves a legal issue resolved in different ways by different courts of appeals (Roller v. Cavanaugh, 984 F.2d 120, 123 (4th Cir. 1993), cert. granted 113 U.S. 2412, cert. dm. 114 S.Ct. 593; Akins v. Snow, 922 F.2d 1558, 1564 (11th Cir. 1991), cert. den. 111 S.Ct. 2915 at ftn. 12; Bailey v. Gardebring, 940 F.2d 1150, 1157 (8th Cir. 1991), cert. den. 112 S.Ct. 1516) and presents a federal question resolved in a way in conflict with a state court of last resort (In re Jackson, 703 P.2d 100 (Cal. 1985); Morales v. Cal. Dept. of Corrections, Appendix A at 1575, ftn. 5).

OPINION BELOW

The opinion for the Court of Appeals for the Ninth Circuit will be reported in the third series of the Federal Reporter and is reprinted in the appendix submitted with this Petition. Appendix A.

JURISDICTION

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. section 1254(1) and Supreme Court Rule 10.1.

STATUTE INVOLVED

The statute involved is subdivision (b) of California Penal Code section 3041.5, as amended in 1977 and in 1981. The 1977 version of section 3041.5(b) stated:

> (2) Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated. The board shall hear each case annually thereafter.

This version was effective until the enactment of section 4, chapter 111 of the 1981 California Statutes. As amended, subdivision (b) read as follows:

> (2) Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated.
>
> The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

Because of subsequent amendments, the provision is now section 3041.5(b)(2)(B).

STATEMENT OF THE CASE

a. Factual background.

A bare recitation of the relevant facts is made in the first, or background, section of the Ninth Circuit opinion. In 1971, respondent was convicted of first degree murder. After being transferred to a half-way house in April 1980, he married. He was paroled in May 1980 and his wife disappeared two months later and was later found dismembered.[1/] Appendix A at 1571 et seq., ftn. 8.

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1. The probation report, exhibit 6 to Supplemental Appendix C, at 468-469 and 474-5 states:

> The victim in the [murder was] a 75-year-old . . . whom [respondent] met when she visited prison inmates. She had visited [respondent] frequently in prison . . . and . . . tried to convert him to her religion, Christian Science. After [respondent] was transferred to Los Angeles to a [prison] half-way house on April 14, 1980 in anticipation of his upcoming parole, she visited him in Los Angeles for one day on April 30, 1980 and secret[]ly married him. She then returned to her home . . . and told friends that she was moving to Los Angeles to live with [respondent]. She left her home July 4, 1980 and was reported missing by her family July 31, 1980. Three days later [her] left hand was found on the freeway . . .

Respondent then pleaded no contest to second degree murder of his wife and his initial parole consideration was held on July 15, 1989. The California

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> After the hand was found it was learned that [respondent] had obtained possession of the deceased's vehicle and had used her credit cards, forging her name. . . . At the time of the arrest [respondent] was in possession of the deceased's car, her purse, credit cards, and her diamond rings. [Her] body has never been found.

The probation officer concluded:

> . . .[T]o regard [respondent] as anything less than a deliberate, calculating, cold-blooded murderer would be untenable. . . . [T]here can be no uncertainty regarding the cruelty he exhibited in both of the murders of which he has been convicted and in both of which he denies guilt.
>
> The danger [respondent] presents cannot be overemphasized and in the best interests of society, it is hoped that he will remain in prison for the rest of his life. <u>If and when parole is ever considered it is hoped that those persons responsible for making this decision will remain cognizant of [respondent's] proven violence and resist whatever manipulative techniques he may devise in the future</u>. [Emphasis added.]

<u>Id.</u> at 479-480.

Board of Prison Terms found respondent unsuitable for parole and set a hearing three years in the future.[2/]

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2. The following is the relevant portion of the August 22, 1989 parole suitability report:

> 1. Commitment offense. The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense and the motive of the crime is very trivial in relation to the offense. . .
>
> 2. Previous record. The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. He has an unstable social history, he has failed previous grants of parole and he cannot be counted upon to avoid criminality. He has failed to profit from society's previous attempts to correct his criminality which include being on parole and then committing another offense.
>
> The prisoner has an unstable social history and prior criminality which includes being found guilty of first degree[] murder, later being granted parole and then committing a second murder. Both being female victims intimately associated with the prisoner.
>
> 3. Institutional behavior. The prisoner has programmed in a limited manner while incarcerated and he has not participated in beneficial self-help or therapy programs.

> 4. Psychiatric factors. . . . The reports state[] as fol[l]ows:
>
> > "A characteristic of an individual with this diagnosis is to avoid conflict whenever possible, but when 'against the wall' to quickly revert to primitive, often violent, behavior, sometimes with little or no recollection of the violent event."
> >
> > "If parole is to be considered it is felt that his violence potential is greater than the average inmate because of his two murders." [Emphasis added.]
>
> The panel finds the prisoner needs therapy in order to face, discuss, understand and cope with his past criminal behavior and reasons for the life crime. Until progress is made, he continues to be unpredictable and a threat to others.
>
> The prisoner needs therapy in a controlled setting, but his motivation and amenability are questionable. . . .
>
> Based on the information contained in the record and considered at the hearing, the panel concludes and states, as is required by PC sections 3043 and 3043.5, that the prisoner would pose a threat to public safety if released on parole.

Therefore, the prisoner is found unsuitable for parole.

In addition to the foregoing reasons supporting postponement of parole consideration, the panel also specifically finds that it is not reasonable to expect that parole would be granted at a hearing scheduled earlier based on the following facts:

1. The prisoner committed the offense in an especially heinous, atrocious and cruel manner wherein he mutilated the vi[c]tim's body after causing said death and, as such, requires a longer period of observation and/or evaluation before the Board can project a parole date.

2. The prisoner has a prior record of violent behavior, to wit, he was convicted of first degree murder in 1970.

3. In view of the prisoner's long history of criminality and misconduct, which includes the aforementioned murder, a longer period of time is required to evaluate his suitability.

4. The recent Psychiatric Evaluations . . . indicated a need for a longer period of observation and evaluation or treatment.
The next hearing will be scheduled in three years.

Supp. Appendix C, Exh. 4 at 4-7.

Respondent filed a petition for a writ of habeas corpus, alleging in pertinent part that he was the victim of an ex post facto change in the frequency of the parole consideration hearings. Id. at 1571-2.

b. Procedural background.

Respondent filed his petition for habeas corpus in the district court for the Central District of California on December 26, 1991. The petition contained several arguments regarding procedural error which are not at issue in this Petition. Supp. Appendix B, Memorandum at 5-6. On December 27, 1991, the district court issued an order to show cause on the petition.

The return was filed on February 24, 1992. Supp. Appendix C. On May 18, 1992, the magistrate judge issued a report which recommended the denial of all issues save the parole issue presented in this Petition. Supp. Appendix D at 13-14. On August 20, 1992, the district court issued an order and judgment rejecting the ex post facto claim and dismissing the entire petition. Supp. Appendix E at 5. A certificate of probable cause issued on September 24, 1992. Supp. Appendix F. The February 9, 1994 opinion of the Ninth Circuit is set forth in Appendix A.

Petitioners intend to file a motion for judicial notice of materials relating to the legislative history of section 3041.5(b)(2) and to the fiscal impact of the Morales decision.

REASONS FOR GRANTING THE WRIT

AMENDMENT OF A LAW GOVERNING THE FREQUENCY OF PAROLE ELIGIBILITY HEARINGS TO PERMIT POSTPONEMENT OF ANNUAL HEARINGS WITHIN THE DISCRETION OF THE BOARD IS NOT AN EX POST FACTO LAW

The Ninth Circuit held that the 1981 amendment of section 3041.5(b)(2) was an ex post facto law as to respondent. In doing so, the Ninth Circuit found that the 1981 amendment "denied Morales opportunities for parole that existed under prior law, thereby making [his] punishment . . . greater than it was under the law in effect at the time his crime was committed." Appendix A at 1575. Whether those "opportunities" were substantial and detrimental under the second prong of Weaver v. Graham, 450 U.S. 24, 32 (1981) is the central issue of this case.

The Ninth Circuit found that the 1981 amendment was detrimental to respondent because it assumed that the greater the number of parole hearings, the greater the probability of parole:

> Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . Accordingly, any retrospective law making parole hearings less accessible would effectively increase the

> sentence and violate the ex post facto clause. [Emphases added.]

Appendix at 1574. The syllogism is flawed and the Ninth Circuit opinion falls with the syllogism. Weaver requires proof by the inmate that he has been disadvantaged (Weaver v. Graham, supra at 29), not speculation and supposition of harm.

a. The 1977 enactment of the California Determinate Sentencing Law.

Prior to July 1, 1977, California law did not require annual parole suitability hearings. In re Jackson, 703 P.2d 100, 101 (Cal. 1985). On July 1, 1977, the determinate sentencing law (DSL)[3] went into effect and set the stage for the instant case. See generally Way v. Superior Court, 141 Cal.Rptr. 383, 386-387 (Cal.Ct.App. 1977); People v. Community Release Board[4], 158 Cal.Rptr. 238, 240 (Cal.Ct.App. 1979).

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3. The main feature of the law, determinate sentencing from a range of three sentence terms for crimes committed in the future, does not affect this case. California Penal Code section 1170.

4. The Community Release Board was the predecessor to the current Board of Prison Terms. The Board determines parole suitability for California state prison inmates and is authorized by California Penal Code section 5075 et seq.

Those who had received a life sentence prior to 1977 were dealt with under California Penal Code section 1170.2(e). That section states:

> In the case of any prisoner who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1168 [indeterminate life sentencing] if the felony was committed on or after July 1, 1977, the Board of Prison Terms shall provide for release from prison as provided by this code.

The Board's duties and the procedural steps with regard to parole are set forth in pertinent part in California Penal Code section 3041.5. The instant case centers on subdivision (b) of that section, relating to the frequency of parole eligibility hearings, as it was enacted in 1977 and as it was subsequently amended for multiple murderers in 1981.

b. The 1977 and 1981 amendments to California Penal Code section 3041.5(b).

Between 1977 and 1981, annual parole eligibility hearings were required by section 3041.5(b)(2). In pertinent part, that provision then read: "The board shall hear each case annually thereafter." In 1981, subdivision (b) of that section was amended to permit hearings every second or third year for multiple murderers within the Board's discretion, if the requisite findings were made.

> The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

These amendments concern those who stand convicted of more than one offense which involve the taking of a life. The net effect was to delete annual parole eligibility hearings, not parole itself, and substitute a hearing within three years for those whom the Board found did not possess a reasonable expectation of parole in the intervening years. The statute plainly states that annual suitability hearings would be held and that extension of the hearings would occur if and only if the proper discretionary findings could be made by the Board.

c. Caselaw exploring the ex post facto ramifications of the 1977 and subsequent amendments.

1. Interpretation of the 1982 amendment to section 3041.5 as a prologue to judicial interpretation of the 1981 amendment.

The first major case exploring the ex post facto ramifications of the enactment of DSL involved a 1982 amendment not affecting respondent in the instant case. In re Jackson, supra. In 1982, section 3041.5(a) was amended to permit hearings every two years for all inmates sentenced under the determinate sentencing law with no parole dates. The procedure for all eligible inmates in 1982 and after was as follows:

> The parole considerations procedures are governed by section 3040 et seq. and apply to all inmates not serving a determinate sentence [i.e. without a determinate term pronounced by the sentencing court]. (Section 1170 et seq.; see sections 3041, 3000.) Once such an inmate has served sufficient time to be eligible or soon eligible for parole, he or she receives notice that a parole suitability hearing before a Board hearing panel will be held. (Sections 3041, 3041.5, 3042.) [Various procedural rights, including the right to counsel, apply.] (Sections 3041.5, 3041.7, 3042; Cal.Admin.Code, tit. 15, sections 2245-2256.)

In re Jackson, supra at 102. Following the hearing, the Board must set a date for release on parole unless it makes certain findings and if it does make detrimental findings, another hearing is set for the next year unless the Board makes other detrimental findings. California Penal Code section 3041.5(a). In that instance, the next hearing will be in two years.

Jackson involved a claim by an inmate who was convicted in 1961. At that time, there was no provision for annual hearings. He appeared at an initial 1983 hearing and was found unsuitable for parole. His next hearing was scheduled for two years hence under the 1982 amendment. Jackson, on state habeas corpus, claimed that he was entitled to annual review under the 1977 procedures. The California Supreme Court found that the change from one-year to two-year hearings was not an ex post facto law:

> Although the issue is close, this court holds that the 1982 amendment is a procedural change outside the purview of the ex post facto clause. The amendment did not alter the criteria by which parole suitability is determined. . . . Nor did it change the criteria governing an inmate's release on parole. . . . Most important, the amendment did not entirely deprive an inmate of the right to a parole suitability hearing. . . . Instead, the 1982 amendment changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability. . . This change did eliminate the possibility that a parole date would be set within the period of postponement. However, the likelihood that the postponement actually delays release on parole until after the next hearing appears slight. [Emphasis added.]

In re Jackson, supra at 105. The California Supreme Court noted that the presence of counsel and the

numerous procedural safeguards at the parole hearing provided "insurance that any postponement decision [would] be well-founded." Id. at 106.

Crucial to the Jackson decision are legislative findings which show that the effect of delaying the hearings was slight.

> The two legislative committee analyses which were prepared while the 1982 amendment was pending in the Legislature provide some insight on this point. At the initial parole suitability hearing, which occurs one year before an inmate's minimum eligible parole date (section 3041), 90 percent of inmates are found unsuitable for parole release. At the second and subsequent parole suitability hearings, approximately 85 percent are found unsuitable. . . . In view of these statistics, the 1982 amendment was seen as a means "to relieve the [Board] from the costly and time-consuming responsiblity of scheduling parole hearings for prisoners who have no chance of being released."

Id. at 106. Moreover, the Jackson case involved a finding of unsuitability for parole. The record contained no evidence "as to how often, if ever, a determination of parole suitability results in an inmate's release on parole soon after a suitability determination. [Emphasis in original.]"

> Such evidence would obviously be relevant to whether inmates are actually disadvantaged-in terms of serving longer prison terms-as a result of a hearing postponement.

Id. Unlike the changed computation of eligibility in Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1100, only the frequency of parole suitability hearings was affected by the 1982 amendment. In re Jackson, supra at 108. Unlike the "gain-time" credits in Weaver v. Graham, 450 U.S. 24 (1981), there was no certain release date to be affected by the amended law in question. In re Jackson, supra at 107. In sum, there was no certain release date to be affected by the amendment and no evidence of any untoward effect on any possible release date.

2. Judicial construction of the 1981 amendment.

The instant case is an attempt to address a problem similar to that explored in Jackson, the ex post facto ramifications of the 1982 amendment. Here an inmate who was clearly entitled to annual hearings at the time of his offense, the offense having occurred after 1977, but who committed the offense prior to the 1981 amendment regarding multiple taking of lives, claims that the 1981 amendment materially increases his punishment and is therefore an ex post facto law. In this situation, Weaver commands an inquiry into whether a retrospective state statute ameliorates or worsens conditions imposed by its predecessor. Weaver v. Graham, supra at 33. Notwithstanding the plain requirement of detriment set

forth in Weaver, Morales states that because an eligibility hearing is a precedent to parole, fewer hearings mean a smaller chance of obtaining parole.

> Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause. [Emphasis added.]

Morales v. Cal. Dept. of Corrections, Appendix A at 1574. Such an assumption does violence to the structure of state law and to the nature and burden of proof in ex post facto litigation. Morris v. Castro, 212 Cal.Rptr. 299, 302 (Cal.Ct.App. 1985).

The Ninth Circuit error in this case tracks Roller v. Cavanaugh, supra at 123. Roller first declares that there is a conflict among the circuits as to the ex post facto effect of diminishing the number of parole eligibility hearings:

> Four of our sister courts of appeals have directly addressed whether a retroactive reduction in the frequency of parole consideration violates the ex post facto clause. Three have held that it does, though the Ninth Circuit's opinion was vacated on other grounds and is thus a nullity. Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979). . .; . . . Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988), vacated 886 F.2d 1093 (9th Cir. 1989)[5]; Akins v. Snow, 922 F.2d 1558 (11th Cir. [1991]), cert. den. . . . 111 S.Ct. 2915 . . . ; but see Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991), cert. den. . . . 112 S.Ct. 1516.[6]

Examination of the cases cited in Roller, with the exception of Bailey, shows that each, as the Ninth Circuit did in the instant case, assumed without proof in the record that the chances of parole are increased if more hearings are held. Each proceeds to judgment without a positive showing of detriment to the inmate, thus failing to meet the second prong of Weaver. Akins v. Snow, supra at 1563. In each, and in the instant Morales opinion, the appellate courts rely on suppositions. For example, in Rodriguez v. United States Parole Comm'n, supra at 176, the word "might" is the operative word.

> Eligibility in the abstract is useless; only an unusual prisoner could be expected to think

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5. It is odd that the Fourth Circuit counted the Ninth Circuit in its camp on the basis of Watson I, 859 F.2d 105. As noted in the Roller opinion, Watson II vacated Watson I and reversed Watson I's conclusions. 886 F.2d 1093-1094.

6. Other listings of relevant cases are contained in Akins v. Snow, supra at 1564, ftn. 12 and U.S. Parole Commission Guidelines for Federal Offenders, 61 ALR Fed. 135, 155-159 (1983).

> that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing.

None of these decisions relies on actual proof of detriment. Rodriguez simply assumes that fewer hearings must be detrimental. Akins assumes that because an eligibility hearing is part of the process which leads to parole, fewer hearings are detrimental. Roller compounds the error by confusing detriment with the inmate's negative subjective reaction to being in prison for a year and then unfairly castigates the parole authorities for failing to prove the negative of what the inmate failed to prove, the actual detriment under the Weaver second prong.

None of these cases comes to grips with the issue of detriment in the manner that Jackson does. In Weaver, the reduction in "gain-time" accumulation must inevitably lengthen the term of imprisonment. No inevitable result flows from a decrease in the frequency of parole eligibility hearings and there is nothing in the record approximating the kind of proof of detriment which appears in Weaver or lack of detriment in Jackson.[7]

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7. The nature of proof of ex post facto violation has recently been explored by the Ninth Circuit. Powell v. Ducharme, 998 F.2d 710 (9th Cir. 1993) in pertinent part involved a claim that under a new parole law the inmate had to be considered for parole at the end of 30 years. The inmate contended this meant that he could not be paroled before the end of this term. However, the Ninth Circuit found that the parole board could redetermine the inmate's discretionary minimum term at any time, including prior to the expiration of his discretionary minimum term.

The Ninth Circuit has erred in ordering three times as many hearings as required by the California Legislature on the basis of mere supposition. There is nothing in the record to indicate that an inmate whose parole suitability hearings come every second or third year instead of annually is being deprived of an earlier parole. There is no inherent relation between the number of hearings and parole because frequency of appearance does not imply improvement of character. It is the nature of the individual which counts and the findings required by statute for extension of the hearings reflect the inherent discretion of the Board to make evaluations and

> Whether the "likelihood" of an earlier parole hearing has been diminished is a question that cannot be answered. It is impossible to make a quantitative comparison between [the new law]. requiring a parole hearing at a certain date, and [the former law], which left such a determination to the unfettered discretion of both the superintendent of the institution and the Board. . . . Such predictions of how the superintendent or the Board would have exercised their discretion have no basis in law.

Id. at 715. Put another way, speculation cannot be used to determine whether a new law prejudices an inmate.

predictions of suitability for parole. California Penal Code sections 3041(b), 3041.5(b)(2). Indeed, if the Board in its discretion finds that "it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding" (California Penal Code section 3041.5(b)(2)), that finding directly and positively negates any inference of prejudice to the inmate which might otherwise be made on a silent record. See footnote 2, supra. It is inconceivable than any reasonable person could find that respondent would be ready for parole in the year immediately following the completion of his minimum term of imprisonment given the horrendous record in this case.

The Ninth Circuit ignores this legislative provision in the instant opinion and yet a review of the Board's findings indicates there was more than ample reason to postpone the next annual hearing. These findings show that annual hearings would be an exercise in futility for respondent. Therefore, respondent was not detrimentally affected by postponement because he had no "reasonable" expectation that the next annual hearings, were they to be held, would result in the granting of parole.

Moreover, it is clear that the timing of the hearings does not alter the fundamental discretion of the Board to grant parole, especially in light of the determination made by the Board when the decision to utilize section 3051.5(b)(2) was made. Where the alteration in parole procedures does not vitiate "individualized consideration" from the parole board, there is no ex post facto issue. Eason v. Dunbar, 367 F.2d 381, 382 (9th Cir. 1966), cert.

den. 386 U.S. 947; Zeidman v. U.S. Parole Commn., 593 F.2d 806, 808 (7th Cir. 1979); see Rifai v. U.S. Parole Commn., 586 F.2d 695 (9th Cir. 1978). Where a parole rule[8/] is not so overly intrusive that it substantively affects the review standard, it is deemed procedural and there is no ex post facto violation. Griffin v. State, 433 S.E.2d 862, 864 (S.C. 1993), overruling Gunter v. State, 378 S.E.2d 443 (S.C. 1989); see Freeman v. Com'n of Pardons & Paroles, 809 P.2d 1171, 1176 (Ida. 1991). Given the discretion exercised by the Board and embodied in the statutory findings, the change from annual hearings is merely procedural. But see Flemming v. Oregon Board of Parole, 998 F.2d 721 (9th Cir. 1993).

Recent Ninth Circuit rulings, including Powell, Flemming and Morales, indicate that there is substantial ambiguity about what comprises substantial harm for the purposes of determining an ex post facto issue. In particular, the Ninth Circuit seems to be grasping at some yet-unarticulated test for prejudice and simultaneously rejecting the utilization of discretion as a factor of consequence. However, it is doing so in direct contradiction of the holdings of the California Supreme Court and at least one of the federal courts of appeal. Moreover it does so in apparent ignorance of the ameliorative and responsible requirement of findings for postponement directed by the California Legislature. This

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8. Morales directly contradicts Jackson as to whether the procedural classification is of any legal moment. Morales v. Cal. Dept. of Corrections, Appendix A at 1575, ftn. 5.

Court must indicate, once and for all, what harm is and how it may be measured for ex post facto purposes.

CONCLUSION

The Ninth Circuit erred in this case because it substituted a supposition of harm for the showing of substantial detriment required by Weaver. The Board has been given discretion to determine parole suitability upon certain statutory criteria and to defer future hearings upon certain statutory criteria. The Ninth Circuit has sought to upset the structure of paroles within the state by micromanaging the timing of hearings without any showing of possible detriment to the inmate amounting to Weaver second prong harm. In doing so, the Ninth Circuit has chosen to ignore the fact that the statutory findings mandated by subdivision (b) clearly establish that there is no prejudice to the inmate from the postponement. At the very least, there is nothing in the record that gainsays these statutory findings.

This Court should grant the petition for certiorari and issue an opinion reversing the Ninth Circuit and defining under what circumstances, if any, procedural changes in the parole process offend the prohibition against ex post facto laws and clarifying the quantum and burden of proof with regard to an ex post facto violation.

DATED: March 1, 1994

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE RAMON MORALES, a/k/a PABLO JOSE RAMON MORALES,
Petitioner-Appellant,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS; E.R. MEYERS, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; BOARD OF PRISON TERMS,
Respondents-Appellees.

No. 92-56262
D.C. No. CV-91-6996-HLH
OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Submitted July 15, 1993*
Submission deferred July 19, 1993
Resubmitted December 7, 1993
Pasadena, California

Filed February 9, 1994

Before: Floyd R. Gibson,** Cynthia Holcomb Hall, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Gibson

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*This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**The Honorable Floyd R. Gibson, Senior Circuit Judge from the Eighth Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Parole/Ex Post Facto Laws

The court of appeals affirmed in part a district court judgment, reversed in part, and remanded. The court held that retrospective application of a state law that allows parole hearings to be delayed for up to three years violates the Ex Post Facto Clause.

Appellant Jose Morales pleaded nolo contendere to second degree murder and was sentenced. At the time of Morales' crime, California law provided that the punishment for his crime included annual parole hearings. California's law regarding parole hearings was later amended to grant the California Board of Prison Terms the power to defer parole hearings for all crimes.

The Board conducted an initial parole consideration and found Morales unsuitable for parole. The Board set his next hearing date for three years later. Morales filed a petition for a writ of habeas corpus, alleging, among other things, that the Board's scheduling of his next parole hearing violated his rights under the Ex Post Facto Clause. The district court denied the petition. Morales appealed.

[1] At the time Morales committed his crime, the crime he committed carried with it a punishment that included annual consideration for parole. By retroactively changing Morales' punishment to include consideration for parole only every three years, his sentence was made more onerous, a violation of the Ex Post Facto Clause.

[2] The amendments to California's law regarding parole hearings did not simply change the procedures used to determine whether prisoners were entitled to parole or the methods used to ensure compliance with the terms of parole; they elim-

inated the possibility of parole altogether in the period between hearings.

COUNSEL

Jose R. Morales, Pro per, Soledad, California, for the petitioner-appellant.

Robin M. Miller, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

GIBSON, Senior Circuit Judge:

Jose Morales appeals the district court's denial of his petition for a writ of habeas corpus. We affirm in part and reverse in part.

I. BACKGROUND

In 1971, Morales was convicted for the first degree murder of his girlfriend. When she was found, it was discovered that her thumb had been cut off. After being transferred to a halfway house in April 1980, he married a woman who had visited him during his incarceration. In May, Morales was paroled; his wife disappeared two months later. Approximately two weeks after she disappeared, her hand was discovered on the Hollywood Freeway in Los Angeles. Her body was never recovered.

Morales pleaded nolo contendere to the second degree murder of his wife and was sentenced to an imprisonment term of fifteen years to life. His earliest parole eligibility date was August 2, 1990. On July 25, 1989, the California Board of

Prison Terms ("the Board") conducted an initial parole consideration, found Morales unsuitable for parole, and set Morales' next hearing date three years later. Morales filed a petition for a writ of habeas corpus, alleging that 1) his rights under the ex post facto clause were violated when his next hearing date was scheduled three years later, 2) he was denied parole based on false and perjured information, and 3) he was not sentenced in accordance with California law. The magistrate judge recommended the writ be denied on counts two and three and issued as to count one. The district court adopted the magistrate's report and recommendation as to counts two and three and denied relief on count one. Morales has appealed pro se.

II. DISCUSSION

A. The Ex Post Facto Clause

Critical to the understanding of Morales' ex post facto claim is an understanding of the evolution of California's law regarding parole hearings. "Between 1972 and 1977, it was the judicially approved policy of California that prisoners should be accorded an annual parole suitability review, except that in extreme cases the review could be every two or three years." *Connor v. Estelle*, 981 F.2d 1032, 1034 (9th Cir. 1992) (per curiam) (quotations omitted). During this time period, criminals were sentenced pursuant to California's Indeterminate Sentencing Law (ISL). *Id.* at 1033. In 1977, the California Legislature replaced the ISL with the Determinate Sentencing Law (DSL). The DSL mandated annual parole hearings, Cal. Penal Code § 3041.5(b)(2) (1976), until it was amended in 1981 to allow the Board to decide, in particular situations, to defer a parole hearing for up to three years when the inmate's crime involved multiple murders. The DSL was again amended in 1982 to grant the Board the power to defer parole hearings for all crimes. *See Watson v. Estelle*, 886 F.2d 1093, 1094-95 & n.1 (9th Cir. 1989) (discussing evolution of this aspect of the DSL).

Article I, section 10 of the Constitution prohibits the states from passing ex post facto laws. The implications of this clause are unusually clear:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; *which makes more burdensome the punishment for a crime, after its commission*, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)) (emphasis added). A law violates the restriction if it is applied retrospectively and implicates these well-known concerns. *Id.* at 46.[1] There can be no doubt that the law is being applied retrospectively; for ex post facto purposes, we examine "the actual state of the law at the time the defendant perpetrated the offense," *Watson*, 886 F.2d at 1096, and in this case California law required annual review when Morales killed his wife.[2] We thus proceed to the thornier aspect of the inquiry: whether the retrospective application of a law enlarging the time between parole hearings violates the protections envisioned by the clause or, instead, is it merely a procedural change in the law that lacks constitutional implication?[3]

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[1]The Supreme Court actually referred to the clause's "core concerns" as those identified by Justice Chase in *Calder v. Bull*, 3 Dall. 386, 390 (1798). *Collins*, 497 U.S. 41-42. However, the Court went on to describe the *Beazell* formulation as a proper "summary," *id.* at 42; we refer to it instead of *Calder* in the interest of brevity.

[2]This point differentiates this case from *Connor* and *Watson*. In both cases, the petitioners committed their crimes before the DSL was passed. *Connor*, 981 F.2d at 1034; *Watson*, 886 F.2d at 1096.

[3]These two questions are really opposite sides of the same coin. A law that is procedural, by definition, will not implicate the core concerns of the

[1] By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed. Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. *Akins v. Snow*, 922 F.2d 1558, 1562 (11th Cir.), *cert. denied*, 111 S. Ct. 2915 (1991). Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause. We base this conclusion on the Supreme Court's observation that the denial of parole is a part of a defendant's punishment. *Warden v. Marrero*, 417 U.S. 653, 662 (1974). The Court went on to note that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex cost facto* clause . . . ." *Id.* at 663; *see also Weaver v. Graham*, 450 U.S. 24, 32 (1981) ("effective sentence is altered once" a determinant in the prisoner's prison term is changed).[4] Other circuits have held that "parole eligibility must be considered part of any sentence." *Akins*, 922 F.2d at 1563 (case similar to the one at bar); *see also Fender v. Thompson*, 883 F.2d 303, 306 (4th Cir. 1989) ("retrospective application of a statute modifying or revoking parole eligibility would" be ex post facto); *United States ex rel. Graham v. United States Parole Comm'n*, 629 F.2d 1040, 1043 (5th Cir. 1980); *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977) (disallowing consideration of parole factors expressly prohibited at the time the crime was committed). When Morales committed his crime, the crime he committed

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ex post facto clause, *see Collins*, 497 U.S. at 45; on the other hand, a law that implicates the core concerns of the ex post facto clause cannot be described as merely procedural. *See Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981); *United States v. Johns*, 5 F.3d 1267, 1271 (9th Cir. 1993).

[4] *Warden* and other cases cited herein address the ex post facto clause as it applies to Congress, U.S. Const. art. I, § 9; however, the analysis is the same under both clauses.

carried with it a punishment that included annual consideration for parole. By retroactively changing Morales' punishment to include consideration for parole only every three years, his sentence was made more onerous in violation of the ex post facto clause.

The respondents advance two primary arguments to support the retrospective application of the 1981 amendment. First, they argue that the change is merely procedural; second, they argue the change does not adversely affect Morales. We reject both contentions.

[2] A purely procedural change in the law, even if applied retroactively, does not violate the ex post facto clause. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977). A procedural change is one that alters the method used to make a determination; for instance, as in *Dobbert*, a statute that changes the role of the judge and jury in determining whether the death penalty should be imposed, *id.* at 293-94; or, as in *Collins*, a statute allowing an appellate court to reform an improper verdict instead of requiring a new trial. 497 U.S. at 52. However, a law that violates the core concerns of the ex post facto clause "is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S. at 29 n.12. The DSL's 1981 amendments do not simply change the procedures used to determine whether prisoners are entitled to parole or the methods used to insure compliance with the terms of parole; they eliminate the possibility of parole altogether in the period between hearings. *Cf. Roller v. Cavanaugh*, 984 F.2d 120, 124 (4th Cir.), *cert. dismissed*, No. 92-1510, 62 U.S.L.W. 4007 (Nov. 30, 1993).[5] As noted in *Roller*,

[5]We are told that the California courts have ruled that this change in the law is procedural, *see In re Jackson*, 703 P.2d 100, 105 (Cal. 1985); *Morris v. Castro*, 166 Cal. App. 3d 33, 39-40, 212 Cal. Rptr. 299, 303-04 (1985), and that we should defer to this "finding." Terming a statute "procedural" does not make it so, *Collins*, 497 U.S. at 46; we thus do not think this is a factual inquiry. To be sure, we must defer to the state courts

" 'statutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility . . . .' " *Id.* (quoting *Fender*, 883 F.2d at 306).

The respondents also contend the changes do not adversely affect Morales because it is unlikely that he would be granted parole within three years. This is irrelevant to the inquiry; Morales' claim does not depend on being able to demonstrate that he would have received parole sooner if he were granted annual parole hearings. *See Flemming v. Oregon Bd. of Parole*, 998 F.2d 721, 724-25 (9th Cir. 1993). It also does not matter that Morales lacks a vested right in parole or a particular parole date. "The presence or absence of an affirmative, enforceable right is not relevant . . . . Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver*, 450 U.S. at 30.

B. The Denial of Parole

The Board found Morales unsuitable for parole because he has an unstable and criminal history, his crime was particularly cruel and atrocious, he still represented a threat to others, and he needed further psychiatric counseling and treatment. Morales contends the Board violated his due process rights by relying on a probation report that contained inaccuracies.[6] In

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on the construction of their laws, but this case does not involve construction of the DSL; rather, it requires consideration of the Federal Constitution, and the inquiry does not call for any special degree of deference to the state courts. *Cf. Lindsey v. Washington*, 301 U.S. 397, 400 (1937); *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993).

[6]Morales also argues that dismembering an already-dead body is not torture, relying on *People v. Franc*, 218 Cal. App. 3d 588, 594-95 267 Cal. Rptr. 109, 112-13 (1990). Though this claim may be true (an issue we need not decide), dismembering a corpse may be considered evidence of a cruel, heinous, or atrocious crime. Moreover, nothing in the record clearly indicates when the dismemberment in this case occurred.

Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389 (9th Cir. 1987), this court held that a parole board's decision satisfied the requirements of due process "if *some* evidence supports the decision." *Id.* at 1390 (emphasis in original). "Additionally, the evidence underlying the board's decision must have some indicia of reliability." *Id.* A relevant factor in this latter inquiry is whether the prisoner was afforded an opportunity to appear before, and present evidence to, the board. *Pedro v. Oregon Parole Bd.*, 825 F.2d 1396, 1399 (9th Cir. 1987), *cert. denied*, 484 U.S. 1017 (1988). In applying these standards to this case, it is important to note the falsehoods Morales complains about are relatively minor,[7] and nothing in the records clearly demonstrates that they are, in fact, falsehoods. The parole board's decision was based on evidence as required by *Jancsek;* specifically, Morales had previously been convicted of first degree murder and had committed the instant offense while on parole for that crime; the crime was heinous, atrocious, and cruel; and psychiatric reports indicated he should not be released. Finally, Morales not only had an opportunity to participate, but he took full advantage of that opportunity and, among other statements, denied any involvement in either murder. Based on the standards enunciated in *Pedro* and *Jancsek*, Morales' due process rights were not violated, and we affirm the district court's judgment on this count.

C. Improper Sentencing

Morales details the evolution of California's sentencing statutes relative to second degree murder. Although Morales' due process rights would be violated if he were sentenced to a term greater than permitted by law, *Marzano v. Kencheloe*, 915 F.2d 549, 552 (9th Cir. 1990), Morales fails to explain how his sentence of fifteen years to life is greater than that

[7]Some representative samples of the alleged inaccuracies include his national origin, his mother's national origin, the degree of planning involved in his crime, and a claim that he forged a diploma.

permitted by the statute then in effect, which called for this very sentence. *See In re Monigold*, 139 Cal. App. 3d 485, 490, 188 Cal. Rptr. 698, 701-02 (1983) (describing evolution in sentencing scheme). Perceiving no possible due process violation in Morales' sentence, we affirm the district court on this count.

III. CONCLUSION

At the time Morales committed his crime, the punishment for that crime included annual parole hearings. Accordingly, the retrospective application of a law allowing parole hearings to be delayed for up to three years is an ex post facto law in violation of the Constitution. The district court's judgment to the contrary is reversed with instructions to enter judgment in Morales' favor and requiring the Board to comply with the law as it existed at the time Morales' crime was committed.[*] We affirm the remainder of the district court's judgment because Morales' due process rights were not violated at sentencing or at the parole hearing.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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[*]Nothing in this opinion should be viewed as an opinion on the wisdom or advisability of releasing Morales on parole.

NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Petitioners

v.

JOSE RAMON MORALES, Respondent.

SUPPLEMENTAL APPENDIX RE PETITION FOR WRIT OF CERTIORARI

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GEORGE WILLIAMSON, Chief Assistant Attorney General
KENNETH C. YOUNG, Senior Assistant Attorney General
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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES,	)	No. Cv 91-6996-HLH(T)
	)	
Petitioner,	)	RETURN TO
	)	PETITION FOR WRIT
vs.	)	OF HABEAS CORPUS
	)	AND MEMORANDUM
DIRECTOR OF	)	OF POINTS AND
CORRECTIONS, E.R.	)	AUTHORITIES IN
MYERS, ATTORNEY	)	SUPPORT THEREOF
GENERAL AND BOARD OF	)	
PRISON TERMS,	)	
	)	
Respondents.	)	

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES,	)	No. Cv 91-6996-HLH(T)
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DIRECTOR OF	)	OF POINTS AND
CORRECTIONS, E.R.	)	AUTHORITIES IN
MYERS, ATTORNEY	)	SUPPORT THEREOF
GENERAL AND BOARD OF	)	
PRISON TERMS,	)	
	)	
Respondents.	)	

Respondents JAMES J. GOMEZ, the Director of the California Department of Corrections, DON HILL, Acting Warden of the California Training Facility in Soledad, California, and JOHN W. GILLIS, Chairman of the California Board of Prison Terms,[1] make this return to the order to show cause pursuant to this Court's order of December 27, 1991, and admit, deny and allege as follow:

I

Petitioner is lawfully and properly in the custody of the California Department of Corrections and is subject to the authority of the California Board of Prison Terms (Board) pursuant to a valid judgment and commitment in the Superior Court of Los Angeles County, Case number A361773. Exh. 1. Petitioner was sentenced to the term of fifteen years to life for the offense of second degree murder, a violation of California Penal Code section 187, following his plea of nolo contendere. Exhs. 1, 2.

II

Respondents admit that petitioner is currently in the custody of the California Department of Corrections at the California Training Facility in Soledad, California. Exh. 5.

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1. Petitioner named the Attorney General of the State of California as a respondent. However, since the Attorney General does not have custody of petitioner, he is not a proper respondent in this matter. Rule 2 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1976).

III

Respondents admit that petitioner has exhausted his state court remedies. Exh. 3.

IV

Respondents deny that petitioner should be allowed to withdraw his plea. Respondents allege that petitioner received the benefit of his plea bargain. Respondents further allege that petitioner was sentenced to a 15 year to life term. Exhs. 1, 2, 8.

V

Respondents admit that petitioner appeared before the Board of Prison Terms for a parole suitability hearing on July 25, 1989 and was found to pose a threat to the community if released on parole. Exh. 4.

VI

Respondents deny that the Board of Prison Terms relied upon improper testimony or inappropriate criteria in their determination that petitioner was unsuitable for parole. Exh. 4.

VII

Respondents admit that petitioner was denied parole for three years. Respondents deny that the application of

Penal Code section 3041.5 operates as an ex post facto law. Respondents further deny that the Board relied on the base term matrix to determine parole suitability. Exh. 4.

VIII

Respondents admit that petitioner was sentenced to an indeterminate term of fifteen years to life under California Penal Code section 1168(b) for second degree murder. Respondents deny that petitioner's life sentence should be treated as a determinate sentence.

IX

Respondents affirmatively allege that under California Penal Code section 3040, the Board is the only agency that is statutorily authorized to allow life prisoners such as petitioner to be released on parole. Respondents further allege that life prisoners such as petitioner are entitled to a parole release date only when the Board has determined that they are suitable for release on parole as provided in California Penal Code section 3041. Respondents deny that petitioner must be paroled in ten years.

X

Except as herein expressly admitted, respondents deny each and every allegation of the petition and specifically deny that petitioner's confinement is in any way improper, that any judgment and commitment underlying petitioner's confinement is in any way improper, and that any of petitioner's rights are being violated in any way.

This return is based on the records and files in this case and the points and authorities and exhibits attached hereto and incorporated herein.

CONCLUSION

For the stated reasons, respondents respectfully request that the petition be dismissed.

DATED: February 24, 1992.

Respectfully submitted,

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GEORGE WILLIAMSON, Chief Assistant
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES,	)	No. Cv 91-6996-HLH(T)
	)	
Petitioner,	)	MEMORANDUM OF
	)	POINTS AND
vs.	)	AUTHORITIES IN
	)	SUPPORT OF
DIRECTOR OF	)	RETURN TO
CORRECTIONS, E.R.	)	PETITION FOR WRIT
MYERS, ATTORNEY	)	OF HABEAS CORPUS
GENERAL AND BOARD OF	)	
PRISON TERMS,	)	
	)	
Respondents.	)	
	)	

PRELIMINARY STATEMENT

On July 2, 1982, petitioner was sentenced to state prison for a term of fifteen years to life for the offense of second degree murder following his plea of nolo contendere. Exhs. 1, 2. Petitioner had been released to parole in 1982 following his eleven year incarceration for a previous first degree murder. Exh. 6. The second degree murder, which occurred in 1980, involved the death of a 75 year old woman who had visited petitioner while he was in prison and secretly married him when he was released to a halfway house. Id. Although her body was never found, her hand was found on the Hollywood freeway. Id. At the time petitioner was sentenced to second degree murder following his nolo contendere plea, the court specifically noted "No finding having been made as to the special circumstances allegation" and no prior felonies. Exh. 1.

Petitioner's earliest minimum eligible parole date (MEPD) for the second degree murder was calculated to be August 2, 1990. Exhs. 5, 7. On July 25, 1989, the Board of Prison Terms (hereinafter the "Board") conducted petitioner's initial parole consideration hearing. Exh. 4. After consideration of all of the evidence presented, the Board found petitioner unsuitable for parole. Id.

The Board stated in its finding of unsuitability for parole that petitioner's offense was carried out in an especially heinous, atrocious, or cruel manner, and that petitioner had a record of violence and assaultive behavior with an unstable social history. Exh. 4. Psychiatric evaluations also did not support release and accordingly, the Board made a finding that

petitioner would pose a threat to public safety. Id. The Board denied parole for three years and scheduled the next parole suitability hearing for July, 1992. Id.

Petitioner filed a petition for writ of habeas corpus with the California Supreme Court on August 22, 1991. Exh. 3. The petition was denied by the California Supreme Court on October 30, 1991 citing In re Miller, 17 Cal.2d 734, 735. Id. Accordingly, petitioner appears to have exhausted his state court remedies. The instant petition was filed in this court on December 26, 1991.

PETITIONER'S CONTENTIONS

Petitioner contends that:

1. The Parole Board's use of the 1970 prior conviction in denying parole suitability is a denial of his eighth and fourteenth amendment rights. Petn., p. 6.

2. The sentencing's court failure to strike his 1970 prior conviction and it's subsequent use in a parole suitability hearing is a denial of his eighth and fourteenth amendment rights. Petn., p. 6.

3. The scheduling of a parole consideration hearing in three years by the Board is an application of an ex post facto law. Petn., p. 6

4. He did not get the benefit of his plea bargain because the trial court at the sentencing hearing failed to

advise him of the consequences of his plea. Petn., p.7.; Petn., P's & A's, p. 5.

5. Under Proposition 7, his term of imprisonment is controlled by California Penal Code sections 2930 and 2931. Petn., p. 7.

6. His plea must be withdrawn because of noncompliance with Penal Code sections 1192.5 and 1192.6. Petn., P's & A's, p. 5.

7. The Board used improper criteria and hearsay statements at his parole suitability hearing. Petn., P's & A's, p. 5.

8. The use of the parole eligibility matrix is an application of an ex post fact law. Petn., P's & A's, p. 5.

9. A fifteen years to life sentence under Proposition 7 and Penal Code section 190 was not intended under Penal Code section 1168(b) to warrant a "straight natural life" sentence. Petn., P's & A's, p. 6.

10. The Board's "sentence" of fifteen years to life in must be stricken because the judge did not say "life" at the time the sentence was imposed. Petn., P's & A's, p. 6.

11. If the court determines that petitioner was sentenced to a term of fifteen years to life, petitioner must be paroled in ten years under Penal Code section 190. Petn., P's & A's, p. 6.

SUMMARY OF RESPONDENTS' ARGUMENT

Petitioner entered an informed plea and received the benefit of his plea bargain. There was a factual basis for the plea in accordance with California Penal Code section 1192.5. Additionally, petitioner was sentenced to a 15 year to life term.

Despite the 1977 change in the California sentencing laws from indeterminate to determinate sentencing, the penalty for second degree murder remained an indeterminate term of fifteen years to life. As a result, petitioner was entitled to consideration for parole by the Board upon completion of his minimum eligible parole date, but is not entitled to either a parole date or release on parole until the Board finds him parole suitable. The Board's use of guidelines to determine petitioner's suitability for parole is proper under the California Code of Regulations. The base term matrix was not utilized by the Board. In addition, the Board's decision to schedule petitioner's next parole suitability hearing in three years in advance is not an application of ex post facto law. Finally, the Board may consider all relevant evidence in making parole decisions. The Board did not use false or inaccurate information in petitioner's case.

ARGUMENT

I

PETITIONER RECEIVED THE BENEFIT OF HIS PLEA BARGAIN

Petitioner contends that the trial court failed to strike the 1970 prior conviction and failed to advise him that the special circumstance allegation would be used as a "non-parole suitability enhancement". Petn., p. 6, 7,; Petn. P's & A's, p. 10. Petitioner also claims that the prosecutor misinformed him of his parole eligibility. Petn., P's & A's, p. 5. Petitioner maintains that his plea should therefore be withdrawn. Id. Respondents disagree and submit that petitioner received the full benefit of his plea agreement.

As a preliminary matter, issues pertaining only to state sentencing procedures are not grounds for federal relief. Strum v. California Adult Authority, 395 F.2d 446, 448. (9th Cir. 1976). Further, the burden is on petitioner to prove by a preponderance of the evidence that his plea was not made voluntarily and intelligently. Johnson v. Lumpkin, 769 F.2d 630, 633-4 (9th Cir. 1985). In a case such as this where there is a complete record of the plea proceedings which shows that petitioner was adequately advised of his rights and the consequences of his plea, petitioner can meet his burden only in the most extraordinary circumstances. Blackledge v. Allison, 431 U.S. 63, 80, 97 S.Ct. 1621, 1631, 52 L.Ed.2d 136 (1977); Boykin v. Alabama, 395 U.S. 238, 243-244, 89 S.Ct. 1709, 1712-1713, 23 L.Ed.2d 274 (1969).

Petitioner first attempts to satisfy his burden by claiming that the trial court failed to strike the special circumstance allegation.[2/] Petitioner is incorrect.

The plea was entered in the instant case on April 13, 1982. Exh. 8. At the time of the plea, petitioner was questioned as to his understanding and willingness to plead guilty. Exh. 8, R.T. 5-13. The record clearly shows that petitioner was aware that he would plead no contest to the charge of second degree murder and that the prosecution would ask the court to dismiss the allegation of special circumstances. Exh 8, R.T. 6. The record clearly shows that a plea to second degree murder was entered into by petitioner. Exh. 8, R.T. 15. The abstract clearly specifies that the court noted that no finding had been made as to the special circumstance allegation. Exh. 1. There is no evidence in the record that shows that the court failed to strike the special circumstance allegation. Accordingly, petitioner's contention must fail.

Petitioner also attempts to satisfy his burden by asserting that the prosecutor informed him that he would be paroled within ten years. Petn., P's & A's, p. 5. Respondents disagree.

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2. Petitioner also claims that the special circumstance allegation was used as a parole enhancement in a parole suitability hearing by the Board. This assertion will be addressed later in the argument. See Argument, Section IV, infra.

The record shows that at the time petitioner entered his plea, the prosecutor told him of the minimum and maximum prison terms he faced as a result of his plea. Exh. 8, R.T. 6. The prosecutor stated that the sentence on a second degree murder is fifteen years to life, but it was possible that petitioner could be released in less than fifteen years and as early as ten years. Id. The prosecutor fully informed petitioner of the possibility of parole but made no promises to petitioner. Id. Accordingly, respondents submit that petitioner received the benefit of his plea bargain and has failed to sustain his burden.

II

THERE WAS A FACTUAL BASIS FOR THE PLEA IN ACCORDANCE WITH CALIFORNIA PENAL CODE, SECTION 1192.5

Petitioner also contends that his plea must be withdrawn because of noncompliance with California Penal Code sections 1192.5 and 1192.6, regarding a factual basis for the plea. Petn., P's & A's, p. 5. Respondents disagree.

Penal Code sections 1192.5 and 1192.6 address plea agreements when a guilty or no contest plea is entered. The requirement under section 1192.5 is that the court shall inquire whether or not there is a factual basis for the plea. Section 1192.6 requires that the prosecutor state reasons for the recommended plea agreement.

In the instant case, a stipulation was entered into by petitioner's trial counsel and the prosecutor that there was a factual basis for the plea. Exh. 8, R.T. 9. Further, the court accepted the plea agreement and specifically found a factual basis for the plea. Exh. 8, R.T. 16. The trial court's use of a stipulation by counsel to establish the factual basis for the plea is appropriate under California law and is more than adequate to pass federal constitutional muster. People v. Enright, 132 Cal.App.3d 631, 634-5, 183 Cal.Rptr. 248 (1982).

Additionally, petitioner has completely failed to demonstrate that any prejudice occurred. In this regard, the analysis in People v. Dolliver, 181 Cal.App.3d 49, 61, 225 Cal.Rptr 920 (1986) is dispositive. In Dolliver, the court noted that, "Appellant does not allege that there was no factual basis for the plea, only that it was not placed upon the record of the plea proceeding. That is not enough. On a collateral attack such as this the defendant must establish that there was no factual basis for the plea, and in the absence of such of showing of actual prejudice, it is presumed that there was a factual basis for the plea."

As was the case in People v. Watts, 67 Cal.App.3d 173, 180-182, 136 Cal.Rptr. 496 (1977), the probation report herein abundantly established that there was a factual basis for petitioner's nolo contendere plea to second degree murder. Exh. 6.

As to petitioner's assertion of noncompliance with Section 1192.6 of the California Penal Code, it is well settled that the purpose of section 1192.6 is to enable the court to make an informed decision as to whether to approve or reject

a proposed plea agreement. People v. Cardoza, 161 Cal.App.3d 40, 45, 207 Cal.Rptr. 388 (1984). Moreover, the People of the State of California are the intended beneficiaries under 1192.6. Id. Accordingly, petitioner's claim should be rejected.

III

PETITIONER WAS PROPERLY SENTENCED TO A 15 YEAR TO LIFE TERM

Petitioner contends that the sentence of fifteen years to life must be stricken because the court at the time of sentencing did not say "life." Petn., P's & A's, p. 6. This contention is without merit.

The sentencing transcript of the July 22, 1982 proceedings reflects the following:

> "In this matter, for conviction of second-degree murder, the defendant will be sentenced to state prison for 15 -- he will be given credit for 700 days time actually served, 350 days good time or work credit for a total of 1,050 days, credit for time served." Exh. 9, R.T. 31.

Respondents submit that this appears to have been an unintentional interruption in thought on the judge's part. The official abstract of judgment and the minute order of July 2, 1982 illustrate that petitioner received a fifteen year to life

term. Exhs. 1, 2. The judge appears to have begun the pronouncement of sentence and was either interrupted or changed thoughts to insure that petitioner received the appropriate pre-sentence credits.

California Penal Code sections 12 and 13 provide that the trial court must impose the punishment prescribed by law. Accordingly, petitioner received a 15 year to life term under California Penal Code sections 190 and 1168, subdivision (b), as the court did not have authority to sentence petitioner to anything other that the statutory indeterminate term of fifteen years to life. Therefore, petitioner's contention is meritless.

IV

THE BOARD'S DETERMINATION OF PAROLE UNSUITABILITY WAS BASED UPON APPROPRIATE CRITERIA

Petitioner contends that the Board improperly relied upon his 1970 conviction and the probation report in determining parole suitability. Petn., p. 6; Petn., P's & A's, p. 5, 7, 10, 12. This contention is without merit.

California Penal Code section 3040 provides that the Board shall have the authority to allow prisoners to be released on parole. In fact, the Board's discretion in parole matters is "great," "almost unlimited" and is subject only to the existence of a factual basis and prisoner's right to procedural due process. In re Powell, 45 Cal.3d 894, 902, 248 Cal.Rptr 431 (1988). Relying on Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed. 2d 356 (1985), Powell held

that as long as there is "some evidence" to support the Board's finding, a decision based upon the exercise of its discretion would be upheld. In re Powell, 45 Cal.3d at p. 904. This is because an exercise of discretion requires a "deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and of the public." Id. at p. 902.

California Code of Regulations, section 2281(b) allows the Board to consider:

> "...[a]ll relevant, reliable information available to the panel ... in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history, past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." Cal. Code of Regs., tit. 15, §2281, subd. (b), emphasis added.

Due to the critical responsibility of the administration of the parole system, the Board is generally permitted to consider all relevant evidence, including hearsay. In re Carroll, 80 Cal. App.3d 22, 30-31, 145 Cal.Rptr. 334 (1978).

In the instant case, the Board considered a number of different documents in assessing petitioner's parole suitability. Exh. 4. The Board considered the criminal history of petitioner. Exh. 4., p. 4. The Board also considered the factual circumstances of the committing offense. Exh. 4. Petitioner asserts that the facts which were taken from the probation report were fabricated. However, as stated above, the Board is entitled to rely on that report, as probation reports are prepared under the authority of California Penal Code, section 1203, subdivision (b) and their use is sanctioned by law. Additionally, the Board considered the psychiatric evaluations of petitioner which did not support release. Exh. 4. Based upon on all of the above-mentioned factors, the Board found that petitioner posed a danger to society and stated specific reasons for its finding of unsuitability. Exh. 4. The consideration of these factors was consistent with the relevant law.

Moreover, the reasons stated for finding petitioner unsuitable for parole were also consistent with the regulations. California Code of Regulations, Title 15, section 2402, subdivision (b) states: "The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner..

(C) The victim was abused, defiled or mutilated during or after the offense."...

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim..."

The basis for the finding of unsuitability was clearly reflected in the record and is accord with the regulations. Therefore, the Board's determination that petitioner was unsuitable for parole was based upon specific criteria that was within its discretion to review. Accordingly, petitioner's contention that the Board used inappropriate criteria in his parole suitability hearing must fail.

V

THE SCHEDULING OF PETITIONER'S PAROLE SUITABILITY HEARING DID NOT CONSTITUTE AN APPLICATION OF AN EX POST FACTO LAW

Petitioner contends that the application of parole suitability guidelines which were not in effect at the time of

his offense in 1980 constitute an ex post facto application of the law. Petn., P's & A's, pp. 5, 8. Respondents disagree.

Parole suitability hearings are governed by California Penal Code, section 3041.5, subdivision (b)(2)B), which provides in pertinent part:

> "The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than ... three years after any hearing at which parole is denied if the same prisoner has been convicted, in the same or different proceedings, of more that one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the basis for the finding." Emphasis added.

Petitioner was convicted of another murder in a different proceeding. Exh. 6. Penal Code section 3041.5 makes clear that petitioner need not have been convicted of more than one murder in the same case for the Board to schedule petitioner's next parole hearing three years in advance.

Petitioner's assertions that the parole suitability law is an application of an ex post fact law is meritless.

California Penal Code section 3041.5 was originally added by the Legislature as part of the Determinate Sentence Law in 1976. Cal. Stats. 1976, ch. 1139, § 281.8, pp. 51-52.

As enacted, that section provided in relevant part that the Board of Prison Terms was required to hold annual parole consideration hearings for life prisoners. Former Pen. Code § 3041.5(b)(2).

In 1981, the Legislature amended section 3041.5(b)(2) to permit the Board to postpone for up to three years the next parole consideration hearing for a life prisoner convicted, in the same or different proceedings, of more than one murder when the board finds that it was not reasonable to expect that the prisoner would be found unsuitable for parole in the interim. Cal. Stats. 1981, ch. 111, § 4, pp. 4339-3430.[3/]

It is well settled that a law is ex post facto if it punishes an act which was not punishable at the time it was committed or if it imposes an additional punishment to that which was prescribed at the time of the act. Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1980); Watson v. Estelle, 886 F.2d 1093, 1094 (9th Cir. 1989). The purpose of prohibiting ex post facto laws is to give individuals fair warning of the effect of their actions, to permit them to rely on the meaning of legislation until it is amended, and to restrain the government from enacting vindictive or arbitrary legislation. Id. at pp. 28-29.

In the case at bench, petitioner committed a murder in 1980, at a time when the punishment was an indeterminate sentence of 15 years to life in prison. Pen. Code §§ 190,

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3. In 1982, the California Legislature again amended section 3041.5(b)(2). That amendment is not at issue in this petition.

1168(B). Further, Penal Code section 3040 which authorizes the Board to determine when and if a life prisoner will be paroled was enacted in 1977. Exh. 11. Section 3041, which provides that a life prisoner will not receive a parole date until the Board determines that he is suitable for parole, was also enacted in 1977. Id. All of the relevant statutory provisions were therefore enacted prior to 1980 when petitioner committed the murder. Additionally, there was and is no requirement that petitioner be found suitable for parole. Greenholtz v. Nebraska Penal Inmates, 442 U.S.1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Therefore, the amendments do not impose criminal liability for conduct which was innocent at the time it occurred.

The critical question in this case, as was true in Weaver, " ...is whether the new provision imposes greater punishment after the commission of the offense ... " Weaver v. Graham, 450 U.S. at p. 32, fn. 17. Thus, it is necessary to determine if the amendment challenged by petitioner in this case produced a more onerous result than the applicable law in effect at the time that petitioner and other similarly situated life prisoners committed their crimes. Weaver v. Graham, 450 U.S. at p. 30.

In the case at bench, there has been no substantive change in the guidelines under which petitioner has been and will be considered for parole suitability. The only change is in the frequency of the parole suitability hearings. The change in law is merely procedural and is therefore not an ex post facto violation. Weaver v. Graham, supra, at p. 29, fn. 12.

The California Court of Appeal is in agreement and held that the amendment to Penal Code section 3041.4 is "merely a procedural change that does not impact the inmates' substantial rights or increase their punishment." Morris v. Castro, 166 Cal.App.3d 33, 37, 212 Cal.Rptr 299, 302 (1985). The Morris court opined that the decision to defer the parole suitability hearing was made only after a full and fair hearing which reviewed and considered the inmate's criminal history, commitment offense, attitude toward his crime, behavior in prison, psychological and rehabilitation problems, age, parole plans as well as marketable skills. Id. at p. 38. Additionally, the deferral occurred because the Board determined that the inmate would pose an unreasonable risk of danger to the public if released. Id. The court stated:

> "We find the changes permitted by the amended statute are proper administrative and procedural methods for dealing with respondent life prisoners, who ... have committed multiple murders, and all of whom have demonstrated that they are unsuitable for early release on parole." Id.

The California Supreme Court likewise acknowledged the procedural-substantive distinction but believed this distinction should be used with great caution, since it is often one of degree, and in close cases such a distinction may well turn on factors as subtle as the court's sense of fair play and justice. In re Jackson, 39 Cal.3d 464, 471-472, 216 Cal.Rptr. 760 (1985).

The Jackson court went on to find that Penal Code section 3041.4 was a procedural change outside the purview of the ex post facto law because the amendment did not alter the criteria by which parole suitability is determined, it did not change the criteria governing the inmate's release on parole and it did not entirely deprive the inmate of the right to a parole suitability hearing. Rather, the amendment changed only the frequency with which such hearings need be held. Id. at pp. 472-473.

The Ninth Circuit has also found that the enactment of the revision of section 3041.5 did not amount to a more onerous penalty. Watson v. Estelle, 886 F.2d 1093, 1096-7 (9th Cir. 1989). In the Watson case, the petitioner had been convicted of multiple murders and sentenced to the death penalty. However, the death penalty was subsequently invalidated by the California Supreme Court and Watson's sentence was reduced to life imprisonment with the right to parole. Although the petitioner in Watson had no expectation of regular parole consideration hearings at the time he committed the crime, he was subsequently afforded periodic parole consideration hearings with the enactment of Penal Code section 3041.5. That placed him in the same position as petitioner in the case at bench. The 1981 amendment to Penal Code section 3041.5 is retrospective as to both the petitioner in Watson and the instant petitioner. The Ninth Circuit determined that the petitioner in Watson was not disadvantaged by its application. Id. The court determined that the law did not fail to apprise him of the "grave consequences of this conduct" and, as a result, any subsequent parole eligibility could hardly be considered more onerous.

The situation presented in the instant case is distinguishable from both Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979) and Tiller v. Klincar, 149 Ill.2d 206, 561 N.E. 2d 576, 580 (1990).[4/]

In the Rodriguez case, Rodriguez had been sentenced to a maximum term of two years in prison under a statute which made him immediately eligible for parole. At the time Rodriguez committed his crimes, the parole regulations required that the parole board hold a parole hearing for prisoners sentenced under that statute at the one-third point of their sentence in addition to a much earlier hearing at which few prisoners were ever granted parole. Id. at p. 176.

After petitioner Rodriguez committed his crimes, the parole regulation was revised, eliminating the one-third hearing requirement and replacing it with one which called for additional review hearings to be held not less frequently than 18 months after the initial hearing. Id. at p. 172.

The Seventh Circuit held that the regulation's application to Rodriguez violated the constitutional proscription against ex post facto laws, not simply because it changed the frequency of parole hearings, but because in the case of prisoners with short sentences, the regulation denied

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4. Respondents mention cases from other jurisdictions because in response to previous petitions submitted by petitioner, the court requested that the holdings of these particular cases be addressed.

them any opportunity for release on parole prior to the expiration of their maximum sentences. Id. at p. 176.

In Tiller v. Klincar, 149 Ill.2d 206, 561 N.E.2d. 576, 580 (1990), the court interpreted the delay in parole hearings as being an ex post facto law because it disadvantaged the petitioner. The facts set forth in Tiller do not make it possible to readily compare all the relevant statutes of Illinois to those of California. The statute in the instant case is distinguishable because California Penal Code section 3041.5 (b)(2)(B) applies only to those life prisoners who have committed more than one murder. Furthermore, the Tiller court did not examine what criteria is utilized in Illinois to determine parole suitability or whether the criteria changed with the amendment of the time for parole review hearings. Moreover, the Tiller court relied on the rationale of Rodriguez which has significant factual differences. Finally, the opinion of a foreign state should be given little weight in light of the fact that the California Court of Appeal, the California Supreme Court and the Ninth Circuit are all in harmony on this issue.

Accordingly, respondents submit that there is no ex post facto application of California Penal Code section 3041.4 and therefore petitioner's contention must fail.

VI

THE BOARD DID NOT UTILIZE A BASE TERM MATRIX

Petitioner contends that the Board's use of the parole eligibility matrix constitutes an ex post facto application of the law. Petn., P's & A's, p. 5.

Presumably, the matrix to which petitioner refers is the one set forth in California Code of Regulations, Title 15, Section 2403 which determines the base term for life prisoners. Petitioner's allegation is without merit because the Board did not use the matrix in determining petitioner's parole unsuitability status. Until such time as petitioner is found suitable for parole no base term will be set. Calif. Code of Regs., tit. 15, § 2403; Penal Code §§ 3040, 3041. Because the matrix which petitioner is apparently alluding to was not considered in his parole suitability hearing, his contention is completely meritless.

VII

PETITIONER IS NOT ENTITLED TO A PAROLE RELEASE DATE UNTIL THE BOARD DETERMINES THAT HE IS SUITABLE FOR RELEASE ON PAROLE

Petitioner contends that a fifteen year to life term was not intended under Penal Code section 1168(b) to warrant a straight life term. Petn., P's & A's, p. 6. Petitioner also

contends that he must be paroled in ten years under California Penal Code section 190. Petn., P's & A's, p. 6. Petitioner further contends that his term of imprisonment is controlled by California Penal Code sections 2930 and 2931 after Proposition 7. Respondents disagree and assert that petitioner has a fundamental misunderstanding of California sentencing and parole laws.

The United States Supreme Court has determined that "[t}here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Nebraska Penal Inmates, supra, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed. 2d 668 (1979). A state may create a liberty interest sufficiently embraced within the concept of Fourteenth Amendment "liberty" to entitle an inmate to minimal procedures to insure that such interest is not arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935, 951 (1974). However to state a claim for denial of a due process interest arising under state law, the state law at issue must create a legitimate claim of entitlement to the interest rather than merely an abstract desire for it. Greenholtz, 442 U.S. at 7.

Under California's prior sentencing procedure, the Indeterminate Sentencing Law (ISL), the Adult Authority rather than the court fixed the actual length of prison terms.[5/]

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5. The Adult Authority was the predecessor agency of the Board of Prison Terms.

In 1977, the ISL was repealed and the Determinate Sentencing Law (DSL) became effective. See Penal Code §§ 1170 et. seq.

The DSL provided for two separate sentencing procedures. The first procedure provided that the courts would fix the actual length of term for any individual who committed an offense, "for which any specification of three time periods of imprisonment ... is now prescribed by law or for which only a single term of imprisonment in state prison is specified ... " §§1168(a) §1170(h).

The second sentencing procedure involves prisoners convicted of certain felony offenses such as first or second degree murder for which life imprisonment can be imposed. Under section 1168(b), a prisoner not subject to the three term or single-term sentencing format of 1168(a) does not received a term fixed by the court. Section 3040 provides that the Board, rather than the courts, has the power to parole prisoners sentenced to indeterminate terms under section 1168(b).

In the present case, petitioner was convicted of second degree murder, a violation of section 187. Section 190(a) provides the punishment for second degree murder. This section obviously does not prescribe a choice of three terms or a single term of imprisonment as required for sentencing under 1168(a). Thus, the sentencing procedures set forth in sections 1170 et. seq. do not apply.

Rather, the 15 year to life term, an indeterminate term, falls within the criteria in section 1168(b). Therefore,

the court did not fix petitioner's term and only the Board is authorized to determine if, and when, petitioner will be released on parole.

Petitioner's assertion that he was not sentenced under 1168(b) is meritless. He was given a fifteen year to life term, and all prisoners sentenced to indeterminate terms of 15 years to life under section 190(a) are subject to 1168(b) sentencing procedures. Any claim that life does not mean "natural life" is complete nonsense.

Petitioner also appears to assert that section 1168(b) was repealed when Proposition 7 became effective. Proposition 7 was passed by the voters of California in November, 1978 and is now encompassed in section 190. Nothing in Proposition 7 or in section 190 repeals section 1168(b). On the contrary, section 1168(b) and sections 3040 and 3041, provide the exclusive procedure for parole release for prisoners sentenced to indeterminate terms of 15 years to life for second degree murder. Moreover, case law supports the plain meaning and intent of the DSL. See In re Monigold, 205 Cal.App.3d 1224, 1227, 253 Cal.Rptr. 120 (1988); People v. Day, 117 Cal.App.3d 932, 937, 173 Cal.Rptr. 9 (1981).

Finally, petitioner asserts that his term of imprisonment is controlled by Penal Code section 2930 and 2931 and he must be paroled in ten years under section 190. Petn., p. 7; Petn, P's & A's, p. 7. Petitioner is mistaken.

The Board recognized that petitioner is serving an indeterminate term and is not suitable for parole because he

continues to pose an unreasonable risk of danger to society if released on parole. Exh. 4. Until the Board determines that petitioner is suitable under the previously mentioned factors, he is not entitled to a parole date. Therefore, he has no right to a parole date at a fixed time. In re Schoengarth, 66 Cal.2d 295, 300, 57 Cal.Rptr. 600, 603 (1967); In re Duarte, 143 Cal.App.3d 943, 946-7, 193 Cal.Rptr. 310, 313 (1983).

Contrary to petitioner's assertions, Penal Code section 2931 allows only for the calculation of earned credits in order to determine the minimum eligible parole date. See Exh. 7. Section 190 only allows for the use of reduction credit in accordance with section 2930 et. seq. Therefore, petitioner's contentions are completely meritless.

VIII

THE BOARD DID NOT CONSIDER THE TESTIMONY OF LARRY WILSON IN ARRIVING AT ITS DETERMINATION OF PAROLE UNSUITABILITY

In a very convoluted fashion, petitioner asserts that the testimony of Larry Wilson was used against him by the Board in his parole review hearing. Petn., P's & A's, p. 17. Petitioner's assertion is erroneous.

A review of the factors which the Board considered in the parole review hearing indicate that the testimony of Larry Wilson was not a factor considered by the Board. Exh. 4. Accordingly, petitioner's contention has no merit.

CONCLUSION

For all the reasons stated, respondents respectfully request that the petition for writ of habeas corpus be denied and the order to show cause discharged.

DATED: February 24, 1992.

Respectfully submitted,

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CALIFORNIA BOARD OF PRISON TERMS

In the Matter of the
Hearing of

Life Prisoner

MORALES, Pablo
B-33187

Initial Parole Consideration
Denied (3 Years)

CTF

This matter was heard before the Board of Prison Terms (BPT) on July 25, 1989, at the Correctional Training Facility. The hearing panel was composed of W. Morgan, Commissioner; E. Tong, Commissioner; and J. Thompson, Deputy Commissioner.

Present at the hearing were: P. Morales, Prisoner; S. Cole, Counsel for Prisoner; and L. Diamond, Deputy District Attorney, Los Angeles County.

Any others present are identified in the transcript.

Oral and documentary evidence was submitted and after due consideration of all the evidence, the panel makes the following findings:

Legal Status

On July 13, 19982, the prisoner was received in prison pursuant to Penal Code (PC) §1168 for a violation of PC §187, second degree murder (Los Angeles County Case No.

A-361773, Count 1). The controlling minim eligible prole date is August 2, 1990.

PC §3041(a) provides that the BPT shall meet with persons sentenced under PC § 1168 and shall normally set a parole release date unless, pursuant to PC §3041(b), the Board determines that a parole date cannot be fixed at this hearing.

This hearing is conducted pursuant to Title 15, California Code of Regulations (CCR), Division 2, Chapter 3, Article 5, which sets forth parole consideration criteria and guidelines for life prisoners implementing PC §3041.

Statement of Facts

The victim in this offense was Lois Washabaugh, a 75-year-old female. The victim was a widow and lived in a mobile home in Soquel, California. She had become interested in prison reform and started visiting prison inmates including the prisoner who she saw frequently while he was incarcerated in Soledad.

The prisoner was transferred to the Los Angeles area half-way house on April 14, 1980, and in anticipation of his upcoming parole the victim visited Los Angeles for one day on April 30, 1980, and secretly married him. On July 4, 1980, she left her mobile home in Soquel, California and told friends that she was moving to Los Angeles to live with her husband.

On July 7, 1980, a human hand was found by officers of the Los Angeles Police Department in the traffic lane on the northbound Hollywood freeway at Vermont. A missing

persons report had been filed on the deceased on or about the end of July of 1980 and an investigation as to her disappearance was initiated by detectives from Los Angeles Police Department Robbery/Homicide Division and the Santa Cruz Sheriff's Department. On August 7, 1980, investigation disclosed through fingerprint identification that the human hand that was found on the freeway was that of Mrs. Washabaugh. After the hand was found it was learned that the prisoner had obtained possession of the victim's vehicle and had used her credit cards, forging her name. The prisoner was subsequently taken into custody at Wells Bailbonds office at 212 East Regent Street where he lived. At the time of the arrest the prisoner was in possession of the victim's car, purse, credit cards and diamond rings. The victim's body has never been found.

Parole Suitability

CCR §2281(a) requires that the panel first determine whether the prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison. CCR §2281(c) sets forth circumstances tending to show unsuitability and CCR §2281(d) sets forth circumstances tending to show suitability. These regulations are guidelines only.

The panel relied on the following circumstances in determining whether or not the prisoner is suitable for parole:

1. Commitment offense. The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense and the motive of the crime if very trivial in relation to the offense.

These conclusions are drawn from the Statement of Facts wherein the prisoner after killing the victim proceeded to mutilate the body.

2. Previous record. The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. He has an unstable social history, he has failure previous grants of parole and he cannot be counted upon to avoid criminality. He has failed to profit from society's previous attempts to correct his criminality which include being on parole and then committing another offense.

The prisoner has an unstable social history and prior criminality which includes being found guilty of first degree murder, later being granted parole and then committing a second murder. Both being female victims intimately associated with the prisoner.

3. Institutional behavior. The prisoner has programmed in a limited manner while incarcerated and he has not participated in beneficial self-help or therapy programs.

4. Psychiatric factors. The Psychiatric Evaluations dated April 12, 1989, by Clyde V. Martin, M. D., Staff Psychiatrist, and May 31, 1985, by Philip S. Hicks, M. D., Staff Psychiatrist, are not totally supportive of release. The subject's criminal

behavior is directly related to his psychopathology. The reports states as follows:

"A characteristic of an individual with this diagnosis is to avoid conflict whenever possible, but when 'against the wall' to quickly revert to primitive, often violent, behavior, sometimes with little or no recollection of the violent event."

"If parole is to be considered it is felt that his violence potential is greater than the average inmate because of his two murders."

The panel finds the prisoner needs therapy in order to face, discuss, understand and cope with his past criminal behavior and reasons for the life crime. Until progress is made, he continues to be unpredictable and a threat to others.

The prisoner needs therapy in a controlled setting, but his motivation and amenability are questionable.

The prisoner is commended for completing a course in computer technology, for remaining disciplinary free and for receiving laudatory work chronos.

Based on the information contained in the record and considered at this hearing, the panel concludes and states, as required by PC §§3043 and 3043.5, that the prisoner would pose a threat to public safely if released on parole.

Therefore, the prisoner is found unsuitable for parole.

PC §3041.5(b)(2) permits a three year denial if a prisoner has been convicted, in the same or different proceedings, of more than one offense which involves taking a life and the Board finds that it is not reasonable to expect that parole would be granted at a hearing during the intervening years. In addition to the foregoing reasons supporting postponement of parole consideration, the panel also specifically finds that it is not reasonable to expect that parole would be granted at a hearing scheduled earlier based on the following facts:

1. The prisoner committed the offense in an especially heinous, atrocious and cruel manner wherein he mutilated the vitim's body after causing said death and, as such, requires a longer period of observation and/or evaluation before the Board can project a parole date.

2. The prisoner has a prior record of violent behavior, to wit, he was convicted of first degree murder in 1970.

3. In view of the prisoner's long history of criminality and misconduct, which includes the aforementioned murder, a longer period of time is required to evaluate his suitability.

4. The recent Psychiatric Evaluations dated April 12, 1989, but Clyde V. Martin, M.D., Staff Psychiatrist, and May 31, 1985, by Philip S. Hicks, M.D., Staff Psychiatrist, indicate a need for a longer period of observation and evaluation or treatment.

The next hearing will be scheduled in three years.

Recommendation

PC §3041.5(b)(2) provides that within 20 days following any meeting where a parole date has not been set, the Board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date and when the prisoner can reasonably expect to be considered again for the setting of a parole date and in what beneficial activities the prisoner might participate.

This case shall be scheduled for hearing for parole consideration as provided in 15 CCR §2270(c).

In preparation for the next parole consideration hearing, the panel recommends that the prisoner:

1. Remain disciplinary free.

2. Participate in self-help and/or therapy programming.

3. Involve himself in alcohol abuse programming and authenticate records of educational pursuits.

Order

Based on the foregoing findings and reasons, parole is denied.

EFFECTIVE DATE OF THIS DECISION AUG 22 1989

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
PROBATION OFFICERS REPORT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff

vs.

PABLO JOSE ANTONIO MORALES,
Defendant.

RUE NAME AKA:
PAUL ANTHONY MOKELE,
PAUL SIKUKUNI

Charged With the Crime(s) of
187 PC (MURDER WITH PREVIOUS MURDER CONV.) PER 190.2(A)(2).

Convicted of the Crime(s) of
187 PC, SEC. DEG.

R E P O R T
SEQUENCE
No. Dept. 120

Atty. De Blanc

Judge Ricks

Hearing
6-18-82

C.I.I.
 # 3758624

Court Case No.
A-361773

DPO D. Feldman

Area Office CAI

Prob. No. X-91193

Address (if in custody, expected address when released)

**COUNTY JAIL,
BKG NO. 5812477**

By Plea

Days in Jail This Case - Approx 700

Companion Cases	Disposition
None	N/A

PERSONAL HISTORY

Age	Birthdate	Race	Formal Educ.	Age Left School
41	4-4-40	Black	Unknown See Report	Unknown

Marital Status	Home Included	No. of Dependents
Single	(Last) Defendant	None

Occupation	Income Per Month	Where Employed
None	None	Unemployed

Health	Came to State	Came to County	Branch of Mil. Service
Good	1967	1968	None

Kind of Discharge
N/A

(AS SUPPLIED BY DEFENDANT, PROBATION FILES, DEPARTMENT OF CORRECTIONS, AND INTERESTED PARTIES.)

IT SHOULD BE NOTED THAT NO VERIFIABLE INFORMATION HAS EVER BEEN OBTAINED REGARDING THE DEFENDANT'S BACKGROUND AND NOTHING IS KNOWN ABOUT HIM PRIOR TO 1970 WHEN HE WAS CONVICTED FOR MURDER. IN THE PAST AS WELL AS CURRENTLY, ALL EFFORTS TO OBTAIN VERIFIABLE INFORMATION REGARDING HIS PERSONAL HISTORY AND FAMILY HAVE BEEN UNSUCCESSFUL.

THROUGH THE YEARS THERE HAVE BEEN SOME CHANGES IN THE DEFENDANT'S VERSION OF HIS BACKGROUND. HE HAS CONSISTENTLY ALLEGED BIRTH IN PUERTO RICO. CURRENTLY HE CLAIMS THAT HE WAS ONE OF THREE CHILDREN, AND HAS ONE BROTHER AND ONE SISTER. HOWEVER, IN PREVIOUS PRE-SENTENCE INVESTIGATIONS DEFENDANT SAID THAT HE WAS THE YOUNGEST OF THREE SONS AND ALSO CLAIMED THAT HE HAD TWO BROTHERS FOLLOWING COMMITMENT TO STATE PRISON. HE CLAIMS NO KNOWLEDGE OF THE ADDRESS OF EITHER OF HIS SIBLINGS.

ALLEGEDLY HE WAS BROUGHT TO NEW YORK BY HIS PARENTS WHEN HE WAS 12 YEARS OLD. CURRENTLY HE STATES THAT HIS FATHER, WITH WHOM HE LAST HAD CONTACT IN 1965, IS NOW DECEASED AND REPORTS THAT HIS MOTHER DIED FOLLOWING A CAR ACCIDENT IN 1966, BUT COULD NOT PROVIDE EXACT DATES OF THE DEATH OF EITHER PARENT. FOLLOWING COMMITMENT TO STATE PRISON HE CLAIMED THAT HIS FATHER BECAME AN ALCOHOLIC AFTER THE FAMILY MOVED TO NEW YORK WHICH RESULTED IN THE BREAK-UP OF THE FAMILY AND RELATED THAT HIS MOTHER LATER LIVED WITH A BOYFRIEND. HE NOW REITERATES THAT HIS PARENTS DID SEPARATE WHEN HE WAS 13, BUT ALLEGES NO KNOWLEDGE THAT HIS FATHER WAS AN ALCOHOLIC OR HIS MOTHER'S SUBSEQUENT ACTIVITIES AND/OR RELATIONSHIPS. HE ALLEGES THAT HIS FATHER WAS BORN IN PUERTO RICO AND HIS MOTHER IN THE VIRGIN ISLANDS. (IT SHOULD BE NOTED THAT THE DEFENDANT HAS WHAT APPEARS TO BE A SLIGHT WEST INDIAN ACCENT.) WHILE IN STATE PRISON DEFENDANT SAID THAT HE HAD BEEN SELF-SUPPORTING SINCE AGE 13, FIRST STARTED WORKING AS A SHOESHINE BOY SELLING PAPERS ON THE STREET CORNERS OF NEW YORK. HE NOW STATES THAT AFTER HIS PARENTS SPLIT UP HE LIVED WITH AN UNCLE, RAYSHALL CORDEZA, BUT COULD PROVIDE NO INFORMATION AND DESCRIBED HIMSELF AS "A STREET KID."

SEEMINGLY NO VERIFIABLE INFORMATION IS AVAILABLE REGARDING THE DEFENDANT'S EDUCATION. DURING PREVIOUS PRE-SENTENCE INVESTIGATIONS, THE DEFENDANT CLAIMED THAT HE QUIT SCHOOL IN THE SIXTH GRADE WHILE IN NEW YORK AT AGE 13 TO GO TO WORK. hOWEVER, AT THIS TIME THE DEFENDANT STATES THAT HE NEVER ATTENDED SCHOOL IN NEW YORK, AND NOW ALLEGES THAT WHILE HE WAS IN SAN QUENTIN HE TOOK 60 UNITS AND RECEIVED A BACHELOR OF ARTS DEGREE FROM FRANCONI, A COLLEGE, NEW YORK. INVESTIGATION REVEALS THAT THIS IS A NONEXISTENT COLLEGE - DEFENDANT SENT FOR A MAIL ORDER CERTIFICATE.

WHILE PREPARING HIS "PERSONAL RESUME" BEFORE HE WAS PAROLED FROM PRISON, HE ALLEGED A BACHELOR OF ARTS DEGREE IN SOCIAL SCIENCE AND POLITICAL HISTORY IN 1978 AND A GRADUATE DEGREE AND CERTIFICATE AND HIGH SCHOOL ACCOUNTING FROM BAYVIEW HIGH SCHOOL IN CALIFORNIA AND "SELF-TAUGHT" PARALEGAL TRAINING FROM 1971 TO 1980 (WHILE HE WAS IN PRISON) PLUS BACHELOR OF SCIENCE GRADUATE DEGREE IN LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE FROM TENNESSEE CHRISTIAN UNIVERSITY, CHATTANOOGA, TENNESSEE. IN ADDITION, HE DESCRIBED HIMSELF AS "A LAW CLERK" FROM 1971 TO 1980 (WHILE HE WAS IN PRISON) WHICH HE ALLEGED THAT HIS DUTIES INCLUDED HOSPITAL

CLERK, EDUCATION RECORDS CLERK, ACCOUNTING CLERK, AND LAW CLERK WHICH CONSISTED OF A FULL RANGE OF GENERAL, CIVIL, AND CRIMINAL LAW INCLUDING COUNSELLING, LEGAL RESEARCH, DRAFTING OF LEGAL PLEADINGS, AND LEGAL MEMORANDUMS, ETC. HE EXPRESSED GOALS TO FURTHER HIS EDUCATION IN THE ACADEMIC AND LEGAL FIELD WITHIN VOCATIONAL REHABILITATION OR SOCIAL WORK AND TO ULTIMATELY EARN A LAW DEGREE, AND OBTAIN EMPLOYMENT WITH THE COUNTY, STATE, AND FEDERAL AGENCIES OR WITHIN THE CRIMINAL JUSTICE SYSTEM IN PRIVATE OR PUBLIC ORGANIZATIONS. PRIOR TO HIS PAROLE, THE DEFENDANT SENT APPLICATIONS OF EMPLOYMENT ON AUGUST 30, 1979 TO THE LOS ANGELES COUNTY PROBATION DEPARTMENT AS "PROBATION TRAINEE" AND ALSO INDICATED A DESIRE TO PARTICIPATE IN VOLUNTEER ORIENTATION CLASSES WITHIN THE VOLUNTEERS IN SERVE TO OTHERS (VISTO) PROGRAM. IN JULY OF 1979 HE SENT A LETTER THAT HE WAS TRYING TO MOVE TO A HALF-WAY HOUSE LOCATED WITHIN A DISTANCE FROM ANY BRANCH OF THE VISTO PROGRAM AND THE FOLLOWING MONTH SENT ANOTHER LETTER INDICATING THAT HE WAS ELIGIBLE FOR WORK FURLOUGH AND REQUESTED THAT MATERIALS BE SENT TO HIM REGARDING THE PROGRAM. IN CORRESPONDENCE SENT TO THE LOS ANGELES COUNTY PROBATION DEPARTMENT IN CARE OF THE VISTO PROGRAM IN NOVEMBER OF 1976 HE ALLEGED THAT HE HAD A BACHELOR DEGREE IN

SOCIAL HISTORY AND WAS THEN ENROLLED IN CALIFORNIA STATE UNIVERSITY - DOMINGUES HILL IN THE MASTERS OF HUMANITIES EXTERNAL DEGREE PROGRAM AND HAD A "FUNDING PROBLEM WITH CAL STATE". IN CORRESPONDENCE HE NOTED THAT HIS PREFERENCE IN THE VISTO PROGRAM WAS TO ASSIST PROBATION OFFICERS IN PREPARING "CUMULATIVE CASE SUMMARIES, PROFESSIONAL INVESTIGATORY PROCEDURES WITH ANY KIND INCLUDING JOB PLACEMENTS, ETC."

NOTHING IS KNOWN OF THE DEFENDANT'S EMPLOYMENT. HE NOW STATES THAT HE LEFT NEW YORK CITY AT THE END OF 1956, TRAVELLED BOTH IN THE UNITED STATES AND ELSEWHERE AND HAD A VARIETY OF JOBS NONE OF WHICH CAN BE VERIFIED.

AFTER HE WAS PAROLED IN APRIL OF 1980, THE DEFENDANT WORKED AS A BAILBOND "CONSULTANT" FOR WELLS BAILBOND AT 212 EAST REGENT STREET IN INGLEWOOD WHERE HE LIVED AND WAS ARRESTED.

THE DEFENDANT HAS NEVER FATHERED ANY CHILDREN AND HIS ONLY MARRIAGE WAS TO THE VICTIM IN THIS OFFENSE, LOIS WASHABAUGH, A 75-YEAR-OLD CAUCASIAN, WHOM HE MET WHEN SHE VISITED PRISON INMATES. SHE HAD VISITED HIM FREQUENTLY IN PRISON IN SOLEDAD AND ALLEGEDLY TRIED TO CONVERT HIM TO HER RELIGION, CHRISTIAN SCIENCE. SHE LIVED IN A

MOBILE HOME IN SOQUEL, CALIFORNIA. AFTER THE DEFENDANT WAS TRANSFERRED TO LOS ANGELES TO A HALF-WAY HOUSE ON APRIL 14, 1980 IN ANTICIPATION OF HIS UPCOMING PAROLE, SHE VISITED HIM IN LOS ANGELES FOR ONE DAY ON APRIL 30, 1980 AND SECRETELY MARRIED HIM. SHE THEN RETURNED TO HER HOME IN NORTHERN CALIFORNIA AND SHE TOLD FRIENDS THAT SHE WAS MOVING TO LOS ANGELES TO LIVE WITH THE DEFENDANT. SHE LEFT HER HOME JULY 4, 1980 AND WAS REPORTED MISSING BY HER FAMILY JULY 31, 1980. THREE DAYS LATER LEFT HAND WAS FOUND ON THE FREEWAY, WHICH ULTIMATELY LED TO THE DEFENDANT'S ARREST AND PROSECUTION IN THIS CASE.

NO HEALTH PROBLEMS ARE REPORTED AND THE DEFENDANT IS OF ESTIMATED AVERAGE INTELLIGENCE.

THE DEFENDANT STATES THAT HE WAS RAISED A METHODIST, BUT BECAME A MUSLIM SIX YEARS AGO, AND NOW ATTENDS "ALL SERVICES." HE HAS NO PARTICULAR HOBBIES OR RECREATIONAL INTERESTS.

FINANCIAL SITUATION:

THE DEFENDANT DENIES ANY FINANCIAL RESOURCES OR INDEBTEDNESS.

SUBSTANCE USE:

EXCEPT FOR MARIJUANA WHICH HE SMOKED WHEN HE WAS VERY YOUNG (AGE 15) DEFENDANT DISCLAIMS ILLEGAL USE OF ALL NARCOTICS AND DRUGS, AND STATES THAT HE HAS ABSTAINED FROM INTOXICANTS SINCE 1970.

GANG ACTIVITY:

INVESTIGATION REVEALS NO INFORMATION REGARDING GANG ACTIVITY.

ARREST RECORD:

SOURCES OF INFORMATION:

CII (5-17-82).
ALIAS: PAUL ANTHONY MOKELE.

10-20-66 ROYAL CANADIAN MOUNTED POLICE/OTTAWA, ONTARIO, CANADA - INQUIRY - NO FURTHER DISPO.

(ACCORDING TO DEFENDANT, HE WENT TO CANADA FOR A VISIT AND HAD NEW YORK PLATES AND WAS ARRESTED FOR SPEEDING AND USED A "NICKNAME" AND RELEASED AFTER "MAKE" WAS RUN.)

(A PHONE CALL WAS MADE TO RCMP IN OTTAWA FOR POSSIBLE FURTHER INFORMATION

REGARDING THIS ARREST IN WHICH THE DEFENDANT USED THE NAME OF PAUL ANTHONY MOKELE. IT WAS REPORTED THAT NO FURTHER INFORMATION WAS AVAILABLE UNLESS A COPY OF THE DEFENDANT'S FINGERPRINTS COULD BE SENT. A COPY OF THE DEFENDANT'S FINGERPRINTS WAS REQUESTED FROM THE FBI WHICH TO DATE HAS NOT BEEN RECEIVED.)

3-25-69 PD, BERKELEY - 647(G) PC (PROWLING) - 4-22-69, 30 DAYS SUSPENDED.

(DEFENDANT SAID THAT HE WENT TO A PARTY AND LEFT, THEN RETURNED AND EVERYONE WAS GONE. SOMEONE ACCUSED HIM OF BEING A BURGLAR.)

10-4-69 SO, FORT PIERCE, FLA. - SPEEDING - NO DISPO.

(DEFENDANT STATES THAT HE WAS DELIVERING A CAR FROM SAN FRANCISCO TO FLORIDA, AND HAD NO MONEY FOR A FINE, AND CALLED THE OWNER OF THE CAR WHO SENT HIM MONEY.)

11-4-69 LAPD - 459 PC (BURGLARY) - PLEADED GUILTY TO 647(G) PC (LOITERING/PROWLING) - 90 DAYS SUSPENDED, 12 MOS. SUMMARY PROB., $60 FINE OR 12 DAYS; 415 PC DISM.

(DEFENDANT SAID THAT HE WAS GOING TO A FRIEND'S HOUSE, DID NOT KNOW THE ADDRESS,

AND KEPT KNOCKING ON DOORS. DENIED THAT HE WAS PLACED ON SUMMARY PROBATION.)

(DURING PREVIOUS PRE-SENTENCE INVESTIGATIONS THE DEFENDANT SAID THAT HE HAD ATTENDED A PARTY AND BECAME INTOXICATED, WENT OUT TO GET SOME MORE WHISKEY AND WHEN HE RETURNED APPARENTLY THE PEOPLE HAD LEFT AND HE KNOCKED ON THE DOOR, WENT AROUND TO THE SIDE, BUT COULD GET NO ANSWER. SOMEONE NOTICED HIM AND REPORTED HIM TO THE POLICE AND SAID THAT HE PLEADED GUILTY TO GET OUT OF JAIL BECAUSE HE WAS TIRED OF IT.)

3-7-70 LAPD - 245 PC (ADW) - 3-9-70 RELEASED, COMPLAINANT REFUSED TO PROSECUTE

(DEFENDANT CLAIMS THAT HE SURRENDERED TO THE POLICE ALTHOUGH RECORDS NOTE THAT HE WAS ARRESTED AT HIS RESIDENCE. HE STATES THAT HE AND A MALE FRIEND GOT INTO A FIGHT. HE SAID THAT HE HIT THE GUY AND HE THOUGHT THE GUY WOULD REPORT THE MATTER FIRST.)

7-27-70 LAPD - 187 PC (MURDER) - A-262330, CONV., BY JURY OF FIRST DEG. MURDER. FIXED SENTENCE AT LIFE IN PRISON: 3-11-71 SENTENCED TO PRISON FOR LIFE; RECEIVED DEPT. CORR. 3-19-71, FIRST DEG. MURDER

FROM L.A. CO.; TERM: LIFE; 4-14-80 RELEASED TO WORK FURLOUGH PAROLE, L.A. CO.; 6-22-80 PAROLED FROM WORK FURLOUGH PAROLE TO L.A. CO.

(THIS REFERS TO THE PRIOR MURDER CONVICTION CHARGED IN THE INFORMATION IN THE PRESENT OFFENSE.)

(THE VICTIM IN THIS OFFENSE WAS GINA WALLACE, APPROXIMATELY 35 YEARS OF AGE AT THE TIME OF HER DEATH. HER BODY WAS FOUND BY A REAL ESTATE AGENT ON 7-14-70 IN AN ABANDONED MEDICAL BUILDING SHE WAS SHOWING TO A PROSPECTIVE TENANT. THE DECEASED HAD BEEN SHOT IN THE HEAD, NECK, AND ABDOMEN, AND THE RIGHT THUMB HAD BEEN AMPUTATED. A BLOOD FINGERPRINT WAS OBTAINED FROM THE DOORKNOB LEADING TO THE BATHROOM A THE LOCATION WHERE THE BODY WAS FOUND. SINCE THE BODY WAS NOT IDENTIFIED AT THE TIME OF DISCOVERY, PICTURES WERE CIRCULATED AND PUBLISHED IN LOCAL NEWSPAPERS AND THE DECEASED WAS IDENTIFIED BY A NEIGHBOR. INVESTIGATION DISCLOSED THAT THE DECEASED HAD BEEN LIVING WITH THE DEFENDANT FOR SEVERAL MONTHS PRIOR TO HER MURDER. AFTER HIS DISAPPEARANCE, THE DEFENDANT EXPLAINED HER ABSENCE TO ACQUAINTANCES IN VARIOUS WAYS ALLEGING THAT SHE HAD GONE TO SOUTH CAROLINA, HAD GONE TO PHILADELPHIA TO GET

A DIVORCE, AND HAD GONE TO PHILADELPHIA TO SEE HER MOTHER WHO WAS NEAR DEATH.

(AN AUTOPSY REPORT DISCLOSED THAT THE CAUSE OF DEATH WAS DUE TO GUNSHOT WOUNDS TO THE HEAD, SEVERING THE SPINAL CORD, CAUSING INSTANTANEOUS DEATH. AFTER SHE WAS DEAD THE DEFENDANT MUTILATED THE BODY BY REPEATEDLY SLASHING HER FACE IN ADDITION TO CUTTING OFF THE RIGHT THUMB WHICH WAS NEVER FOUND. THE DEFENDANT WAS ARRESTED AT THE RESIDENCE HE SHARED WITH THE DECEASE. FOLLOWING HIS ARREST IT WAS DETERMINED THAT HIS FINGERPRINTS MATCHED THOSE OF THE FINGERPRINTS FOUND AT THE LOCATION WHERE THE DECEASED'S BODY HAD BEEN DISCOVERED. IT WAS DETERMINED THAT THE DEFENDANT HAD USED THE VICTIM'S CAR FOLLOWING HER DEATH. INVESTIGATION DISCLOSED THAT FOLLOWING THE MURDER THE DEFENDANT BECAME FRIENDLY WITH SEVERAL FEMALES AND IDENTIFIED HIMSELF AS PAUL MORALES, SAID THAT HE WAS AN AFRICAN EXCHANGE STUDENT, WORKING PART-TIME AS A CAR SALESMAN. HE TOOK THE WOMEN TO THE APARTMENT HE SHARED WITH THE DECEASED AND TOLD THEM THAT HIS GIRLFRIEND HAD LEFT HIM VERY HURT AND MISTRUSTING OF WOMEN BECAUSE AFTER LIVING TOGETHER AND PROMISING TO MARRY HIM SHE SUDDENLY DECIDED TO LEAVE AND RETURN TO HER HUSBAND, AND HE ATTEMPTED TO BECOME

ROMANTICALLY INVOLVED WITH ONE OF THE WOMEN HE MET.

(HE DENIED THE CRIME DURING PRE-SENTENCE INVESTIGATION AND FOLLOWING COMMITMENT TO STATE PRISON, AND ALLEGED THAT HE WAS FOUND GUILTY "UNCONSTITUTIONALLY." HE DESCRIBED HIMSELF AS A "VICTIM OF CIRCUMSTANCES" AND ALLEGED THAT HE HAD RECEIVED A LETTER FROM THE DECEASED'S EX-BOYFRIEND, WHO WROTE THAT IF HE COULD NOT HAVE HER, NO ONE ELSE COULD.
(DEFENDANT LATER FILED SEVERAL SUITS NAMING AS DEFENDANTS THE LAPD AND OTHER PERSONS AND AGENCIES.)

PRESENT OFFENSE:

THE DEFENDANT WAS ARRESTED BY OFFICERS OF THE LOS ANGELES POLICE DEPARTMENT, ROBBERY/HOMICIDE DETECTIVES, ON AUGUST 22, 1980 AT 212 EAST REGENT STREET, INGLEWOOD, ON SUSPICION OF MURDER. HE WAS CHARGED WITH 187 PENAL CODE (MURDER WITH A PRIOR MURDER CONVICTION) PURSUANT TO 190.2(A)(2). ON APRIL 13, 1982, IN DEPARTMENT 120, DEFENDANT PLEADED GUILTY TO 187 PENAL CODE, SECOND DEGREE. FURTHER PROCEEDINGS WERE CONTINUED FOR PROBATION AND SENTENCE HEARING TO JUNE 18, 1982, TO WHICH DATE DEFENDANT WILL HAVE BEEN CUSTODY FOR APPROXIMATELY 700 DAYS.

SUMMARIZED FACTS AS BASED ON PRELIMINARY HEARING TESTIMONY, INFORMATION IN THE DISTRICT ATTORNEY'S FILE, AND ARREST REPORTS ARE AS FOLLOWS:

THE VICTIM IN THIS OFFENSE WAS LOIS WASHABAUGH, A 75-YEAR-OLD FEMALE. THE VICTIM WAS A WIDOW AND LIVED IN A MOBILE HOME IN SOQUEL, CALIFORNIA. SHE HAD BECOME INTERESTED IN PRISON REFORM AND STARTED VISITING PRISON INMATES INCLUDING THE DEFENDANT WHOM SHE SAW FREQUENTLY WHILE HE WAS INCARCERATED IN SOLEDAD. SHE WAS A CHRISTIAN SCIENTIST AND APPARENTLY ATTEMPTED TO CONVERT HIM TO HER RELIGION. IN ADDITION TO PRISON VISITS THEY CARRIED ON CORRESPONDENCE WITH THE DEFENDANT WRITING HER NUMEROUS LETTERS, BOTH IN 1979 AND IN 1980, IN WHICH HE ADDRESSED HER IN LOVING AND ENDEARING TERMS DETAILING HIS PLANS FOR THE FUTURE AND ULTIMATELY THEIR LIFE TOGETHER. IN HIS LETTERS HE GAVE HER INSTRUCTIONS AND ADVICE REGARDING HER PROPERTY, SPOKE EXTENSIVELY REGARDING HER MOBILE HOME, AND GLOWINGLY OF THEIR "LOVE-LIFE" TOGETHER. THE DEFENDANT WROTE TO HER OF THE MANY JOB OFFERS THAT HE HAD RECEIVED, HIS EDUCATIONAL PLANS FOR THE FUTURE, AND INSERTED CONSTANT REFERENCES OF CHRISTIANITY AND THEIR SUPPOSED MUTUAL LOVE OF CHRIST.

THE DEFENDANT TRANSFERRED TO LOS ANGELES AREA HALF-WAY HOUSE ON APRIL 14, 1980 AND IN ANTICIPATION OF HIS UPCOMING PAROLE THE DECEASED VISITED LOS ANGELES FOR ONE DAY ON APRIL 30, 1980 AND SECRETLY MARRIED HIM. ON JULY 4, 1980 SHE LEFT HER MOBILE HOME IN SOQUEL, CALIFORNIA AND TOLD FRIENDS THAT SHE WAS MOVING TO LOS ANGELES TO LIVE WITH HER HUSBAND. LATER THAT DAY SHE BOUGHT GAS IN LOS ANGELES AND WAS NEVER SEEN ALIVE AGAIN.

THE DECEASED'S SON, DWIGHT WASHABAUGH, A RESIDENT OF COLORADO, TESTIFIED THAT HE LAST SPOKE WITH HIS MOTHER BY PHONE ON JUNE 27, 1980 AT WHICH TIME SHE WAS IN HER HOME IN SOQUEL, CALIFORNIA. HE HAD NO FURTHER CONTACT WITH HER AFTER THAT DATE. HE TESTIFIED THAT A DIAMOND RING THAT WAS FOUND IN THE DEFENDANT'S POSSESSION FOLLOWING HIS ARREST BELONGED TO HIS MOTHER.

ON JULY 7, 1980 A HUMAN HAND WAS FOUND BY OFFICERS OF THE LOS ANGELES POLICE DEPARTMENT IN THE TRAFFIC LANE ON THE NORTHBOUND HOLLYWOOD FREEWAY AT VERMONT. A MISSING PERSONS REPORT HAD BEEN FILED ON THE DECEASED ON OR ABOUT THE END OF JULY OF 1980 AND AN INVESTIGATION AS TO HER DISAPPEARANCE WAS INITIATED BY DETECTIVES FROM LOS ANGELES POLICE

DEPARTMENT ROBBERY/HOMICIDE DIVISION AND THE SANTA CRUZ SHERIFF'S DEPARTMENT. ON AUGUST 7, 1980 INVESTIGATION DISCLOSED THROUGH FINGERPRINT IDENTIFICATION THAT THE HUMAN HAND THAT WAS FOUND ON THE FREEWAY WAS THAT OF MRS. WASHABAUGH. AFTER THE HAND WAS FOUND IT WAS LEARNED THAT DEFENDANT HAD OBTAINED POSSESSION OF THE DECEASED'S VEHICLE AND HAD USED HER CREDIT CARDS, FORGING HER NAME. THE DEFENDANT WAS SUBSEQUENTLY TAKEN INTO CUSTODY AT WELLS BAILBONDS OFFICE AT 212 EAST REGENT STREET WHERE HE LIVED. AT THE TIME OF THE ARREST THE DEFENDANT WAS IN POSSESSION OF THE DECEASED'S CAR, HER PURSE, CREDIT CARDS, AND HER DIAMOND RINGS. THE DECEASED'S BODY HAS NEVER BEEN FOUND.

DEFENDANT'S STATEMENT:

THE DEFENDANT DECLINED TO SUBMIT A WRITTEN STATEMENT AND REFUSED TO DISCUSS THE CASE. WHEN INTERVIEWED HE SAID THAT ALL THE INFORMATION REGARDING THIS CASE COULD BE OBTAINED FROM LAWRENCE WILSON, AN INMATE AT STATE PRISON, AND DEFENDANT SAID THAT HE PLEADED GUILTY BECAUSE OF HIS PRIOR CASE. HE HAS NO VISITORS AND NO CORRESPONDENCE, AND COMPLAINED THAT EVER LETTER HE SENT OUT OR RECEIVED HAD BEEN XEROXED. HE SAID THAT HE WAS ARRESTED BY THE SAME "TEAM" WHO ARRESTED HIM IN THE

PREVIOUS CASE AND HE HAS BEEN AT A "DISADVANTAGE." IN DISCUSSING THE VICTIM, HE SAID ONLY THAT HE MARRIED HER BECAUSE HER SON WANTED TO PUT HER INTO AN INSTITUTION AND HE NEVER LIVED WITH HER. WHEN RELEASED HE PLANS TO RETURN TO PUERTO RICO OR "NEXT TIME" HE WILL BE "BLOWN AWAY" (REFERRING TO POSSIBLE FURTHER ARRESTS).

DURING THE INTERVIEW THE DEFENDANT WAS ARTICULATE AND COMPOSED AND SELF-ASSURED. IN DISCUSSING HIS BACKGROUND HE SAID THAT HE HAD A VARIETY OF JOBS, WORKED AS A MANAGER OF CLOTHING STORE, SALESMAN, AND TRAVELLED "ALL OVER THE COUNTRY." PRIOR TO ARREST HE HAD BEEN TAKING COURSES AT CALIFORNIA STATE - LOS ANGELES AND HAD RECEIVED A GRANT OF $2,700.

INTERESTED PARTIES:

INVESTIGATING OFFICE STALLCUP, ROBBERY/HOMICIDE DETECTIVES, CONSIDERS THE DEFENDANT EXTREMELY VIOLENT, WHO KNOWS HOW TO MANIPULATE THE SYSTEM. WHILE IN PRISON THE DEFENDANT CONNED PRISON STAFF WHICH LED TO HIS PAROLE. INVESTIGATION DISCLOSED THAT PART OF THE DEFENDANT'S PRISON RECORD DISAPPEARED AND WHILE IN PRISON HE CORRESPONDED WITH WOMEN OTHER THAN THE VICTIM. INVESTIGATION LATER DISCLOSED THAT ONE OF THE WOMEN HE

CORRESPONDED WITH WAS ONE JENNIFER "SUGAR" BOVAIN, A RESIDENT OF SAN DIEGO AND WROTE TO HER REQUESTING THAT SHE FIND A PLACE FOR HIS MOBILE HOME WHICH HE WANTED TO MOVE FROM SALINAS TO ANY PLACE HE COULD FIND A SPACE IN SOUTHERN CALIFORNIA. IN A LETTER WRITTEN TO HER IN MARCH OF 1980 HE CLAIMED THAT A COUPLE HAD BEEN LIVING IN HIS TWO-BEDROOM MOBILE HOME FOR SOME TIME AND HE ALSO INDICATED THAT HE HAD BEEN ACCEPTED AT CALIFORNIA STATE - LOS ANGELES IN THEIR MASTERS PROGRAM. IN THOSE LETTERS TO THIS WOMAN WHICH ALSO INCLUDED REFERENCES TO THE BIBLE, HE CLAIMED THAT ONE OF HIS GRANDPARENTS WAS STILL LIVING IN SOUTH AFRICA.

INVESTIGATING OFFICER DOUBTS THAT THE DEFENDANT COMES FROM PUERTO RICO AND STATES THAT IT HAS BEEN IMPOSSIBLE TO LEARN HIS TRUE IDENTITY. HE FEELS THAT THE DEFENDANT SHOULD NEVER BE RELEASED FROM STATE PRISON AND WILL MAKE HIS FEELINGS KNOWN IF AND WHEN THE DEFENDANT EVER COMES UP FOR PAROLE CONSIDERATION. aS HE DID IN THE PAST, THE DEFENDANT HAS FILED SEVERAL SUITS IN RELATION TO THE PRESENT OFFENSE, INCLUDING SUITS AGAINST LOS ANGELES POLICE DEPARTMENT AND THE CORONER WHO DISCARDED THE VICTIM'S HAND AFTER IT WAS INTRODUCED INTO EVIDENCE.

ACCORDING TO DETECTIVE ENYEART, INGLEWOOD POLICE DEPARTMENT, THE DEFENDANT THOUGH NOT CHARGED IS CONSIDERED A SUSPECT IN THE MURDER OF GEORGE BIEBER, WHOSE BODY WAS FOUND AT HIS BUSINESS ADDRESS WHICH WAS ALSO HIS HOME RESIDENCE ON JULY 17, 1980. THE LOCATION WAS NEXT TO WHERE THE DEFENDANT WORKED AND LIVED AT WELLS BAILBONDS AT 212 EAST REGENT STREET. THE DECEASED HAD BEEN A PRINTER AND FREQUENTLY WORKED LATE AT NIGHT LEAVING HIS DOOR OPEN. HE HAD SUSTAINED MASSIVE TRAUMATIC INJURIES TO THE LEFT SIDE OF HEAD WITH EXTENSIVE LOSS OF BLOOD. IT WAS REVEALED THAT HE HAD SUSTAINED FOUR SEPARATE AND DISTINCT TRAUMATIC INJURIES WHICH DESTROYED CONSIDERABLE BONE STRUCTURE IN THE UPPER JAW AND TEMPLE AREA. IT WAS DETERMINED THAT THE VICTIM HAD BEEN BEATEN NUMEROUS TIMES IN THE FACIAL AREA AND SKULL AND JAW WITH A HAMMER. AT THE TIME THE BODY WAS FOUND HIS WALLET, WHICH CONTAINED UNKNOWN ITEMS, IN A DESK DRAWER WAS OPEN. IT WAS REPORTED THAT THE VICTIM USUALLY KEPT PETTY CASH IN THE DRAWER WHICH WAS ALSO MISSING. IT WAS ALSO LEARNED FROM OWNERS OF A LUGGAGE SHOP AT 220 EAST REGENT STREET, WHO WERE FEARFUL OF RELEASING THEIR NAMES, THAT ON JULY 16, 1980 THE DEFENDANT HAD COME INTO THEIR SHOP AND INQUIRED AS TO WHAT TYPE OF BUSINESS THEY RAN IN THE REAR PORTION OF THEIR SHOP. THE

DEFENDANT TOLD THEM THAT HE LIVED IN THE REAR OF THE BAIL AGENCY AND OFTEN HEARD A TOILET DURING THE NIGHT. THE OWNER TOLD THE DEFENDANT THAT THE TOILET PROBABLY WAS THAT OF MR. BIEBER WHO LIVED IN THE BACK OF THE PRINT SHOP AND WOULD OFTEN WORK LATE INTO THE NIGHT. ACCORDING TO OFFICER ENYEART THE DEFENDANT ALSO ASKED THESE WITNESSES IF THEY HAD A HAMMER. HE DESCRIBES THIS MURDER SAME TYPE AS "OVER KILL" SIMILAR TO THE MODUS OPERANDI IN THE DEFENDANT'S MURDER OF HIS GIRLFRIEND IN 1970.

FOLLOWING IS SUMMARY FROM THE DEPARTMENT OF CORRECTIONS CASE HISTORY. FOLLOWING HIS COMMITMENT TO PRISON THE DEFENDANT CONTINUED TO DENY GUILT AND INITIALLY HE SAID THAT HE WAS NOT INTERESTED IN PAROLE. HE COMPLAINED THAT HIS PUBLIC DEFENDER DID A POOR JOB IN PREPARING THE CASE AND SAID THAT ON NUMEROUS OCCASIONS HE TRIED TO DISMISS HIM, BUT WAS UNSUCCESSFUL. HE ALSO APPEALED TO THE GOVERNOR TO TRADE HIMSELF FOR A PRISONER OF WAR IN VIETNAM ON A LIFE TO LIFE BASIS WHICH WAS REFUSED. HE GAVE A HAZY ACCOUNT OF HIS BACKGROUND AND PAST HISTORY. WHILE IN PRISON HE HAD NUMEROUS PSYCHIATRIC EVALUATIONS AND AT NO TIME WAS THERE ANY INDICATION OF PSYCHIATRIC ILLNESS. HE IMPRESSED PRISON PERSONNEL WITH HIS DESIRE TO IMPROVE HIMSELF AND FURTHER HIS

EDUCATION. HE WAS DESCRIBED AS COOPERATIVE, VERBAL, AND GOAL-ORIENTED. (THE DEFENDANT ALSO MADE A FAVORABLE IMPRESSION ON THE DUTY PROBATION OFFICER WHO PREPARED THE PRE-SENTENCE REPORT IN THE DEFENDANT'S PREVIOUS CONVICTION. DURING THE PRE-SENTENCE INVESTIGATION HE CLAIMED THAT HE CAME HOME EARLY FROM WORK ONE DAY AND SAW THE DECEASED WITH A MAN WHO HAD SUITCASE AND HE FOLLOWED THEM TO THE LOCATION WHERE HER BODY WAS LATER FOUND, THEN LEFT, AND RETURNED TO LOOK FOR HER AND DISCOVERED HER BODY AFTER HE FOLLOWED A TRAIL OF BLOOD. HE ALLEGES THAT HE STARTED DRINKING, TOOK ONE OF THE DECEASED'S RINGS, PAWNED IT TO BUY MORE WHISKEY, AND HAD BEEN THREATENED BY MAIL BY THE DECEASED'S EX-BOYFRIEND AND WAS TOO SCARED TO GO TO THE POLICE. HE ALSO CLAIMED THAT THE GUN FOUND BELONGED TO HER.)

EVALUATION:

DESCRIBE THE DEFENDANT AS AN ENIGNA WOULD BE AN UNDERSTATEMENT. HOWEVER, TO REGARD HIM AS ANYTHING LESS THAN A DELIBERATE, CALCULATING, COLD-BLOOD MURDERER WOULD BE UNTENABLE. ALTHOUGH IT IS UNLIKELY THAT VERIFIABLE INFORMATION REGARDING THE DEFENDANT'S BACKGROUND WILL EVER BE REVEALED, THERE CAN BE NO UNCERTAINTY REGARDING THE CRUELTY HE EXHIBITED IN BOTH

OF THE MURDERS OF WHICH HE HAS BEEN CONVICTED BOTH OF WHICH HE DENIES GUILT.

INVESTIGATION DISCLOSES THAT THE DEFENDANT PRESUMABLY HAS AN ABUNDANCE OF "CHARM" WHICH HE USES TO EXPLOIT, MANIPULATE OTHER INCLUDING THE VICTIM IN THIS OFFENSE, A 75-YEAR-OLD WOMAN WHO FOOLISHLY AND UNFORTUNATELY BECAME MESMERIZED BY THE SPELL HE WEAVED. FACTS REVEALED IN THIS OFFENSE CLEARLY DENOTE THAT THE DEFENDANT'S MOTIVE WAS GREED AND THE DESIRE TO ACQUIRE THE VICTIM'S PROPERTY.

IT IS SIGNIFICANT THAT WHILE HE WAS STILL IN PRISON AND HAD ALREADY "WON" OVER THE VICTIM IN HIS SUPPOSED ROMANTIC PLANS FOR THE FUTURE HE WAS ALSO SIMILARLY ENGAGED IN THE SAME TYPE OF OPERATION WITH A YOUNG WOMAN IN WHICH HE MENTIONED HIS OWN PROPERTY WHICH IN FACT BELONGED TO THE DECEASED. IT MUST THEREFORE BE ASSUMED THAT THE PLANS FOR MURDER HAD BEEN DECIDED UPON LONG BEFORE HIS PAROLE.

IF THE FACTS IN THIS MURDER WERE NOT SO TRAGIC, THE DEFENDANT'S PLAN TO "PROMOTE" HIMSELF WITH HIS GLOSSARY OF HIS EDUCATION AND EMPLOYMENT WOULD BE LAUGHABLE. EVERYTHING THE DEFENDANT HAS DONE HAS BEEN ACCOMPLISHED WITH A DELIBERATE PURPOSE IN MIND, ALL TO ENHANCE HIMSELF.

THE DANGER THE DEFENDANT PRESENTS CANNOT BE OVEREMPHASIZED AND IN THE BEST INTERESTS OF SOCIETY, IT IS HOPED THAT HE WILL REMAIN IN PRISON FOR THE REST OF HIS LIFE. IF AND WHEN PAROLE IS EVER CONSIDERED IT IS HOPED THAT THOSE PERSONS RESPONSIBLE FOR MAKING THIS DECISION WILL REMAIN COGNIZANT OF THE DEFENDANT'S PROVEN VIOLENCE AND RESIST WHATEVER MANIPULATIVE TECHNIQUES HE MAY DEVISE IN THE FUTURE.

SENTENCING CONSIDERATIONS:

CIRCUMSTANCES IN AGGRAVATION:

1. THIS CRIME INVOLVED GREAT VIOLENCE, RESULTING IN THE DEATH OF A HUMAN BEING, DISCLOSING A HIGH DEGREE OF CRUELTY, VICIOUSNESS, AND CALLOUSNESS.

2. THE VICTIM WAS PARTICULAR VULNERABLE IN VIEW OF HER AGE.

3. THE PLANNING WITH WHICH THIS CRIME WAS CARRIED OUT INDICATES PREMEDITATION.

4. THE DEFENDANT HAS ENGAGED IN A PATTERN OF VIOLENT CONDUCT WHICH INDICATES A SERIOUS DANGER TO SOCIETY.

5. DEFENDANT HAS SERVED A PRIOR PRISON TERM.

6. DEFENDANT WAS ON PAROLE WHEN HE COMMITTED THIS CRIME.

CIRCUMSTANCES IN MITIGATION:

NONE.

RECOMMENDATION:

IT IS RECOMMENDED THAT PROBATION BE DENIED AND DEFENDANT SENTENCED TO STATE PRISON.

RESPECTFULLY SUBMITTED,

KENNETH E. KIRKPATRICK
PROBATION OFFICER

BY /s/ Doris Feldman
DORIS FELDMAN, DEPUTY
CENTRAL ADULT INVESTIGATIONS
974-9373

READ AND APPROVED:

/s/ Kenneth Hill
KENNETH HILL, SDPO

(SUBMITTED: 6-14-82)
(RECEIVED: 6-14-82)
(TYPED: 6-16-82)
DF:PH (7)

I HAVE READ AND CONSIDERED THE FOREGOING REPORT OF THE PROBATION OFFICER

_____

JUDGE OF THE SUPERIOR COURT

IF PROBATION IS GRANTED, IT IS RECOMMENDED THAT THE COURT DETERMINE DEFENDANT'S ABILITY TO PAY COST OF PROBATION SERVICES PURSUANT TO SECTION 1203.1B PENAL CODE.

SUPPLEMENTAL APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES, Petitioner, v. DIRECTOR OF CORRECTIONS AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents.	No. CV 91-699-HLH(T) REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

Petitioner is in state custody at Soledad, California. He filed a petition for writ of habeas corpus of December 2, 1991. Petitioner alleges numerous grounds for relief. For the reasons discussed below, he is entitled to partial relief.

FACTS

Petitioner was convicted in 1971 of the first degree murder of his girlfriend. Upon his release from prison in May 1980, he married Lois Washabaugh. She disappeared between July 4 and July 7, 1980. Several weeks later, her left hand was found on the Hollywood Freeway in Los Angeles; her body was never recovered.

In April 1982, petitioner pleaded nolo contendere to the second degree murder of Mrs. Washabaugh. He was sentenced to a term of fifteen years to life.

Petitioner's minimum parole eligibility date for the current conviction was August 2, 1990. On July 25, 1989, the Board of Prison Terms (the "Board") conducted an initial parole reconsideration hearing. The Board found petitioner unsuitable for parole for the following reasons:

> The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense.... The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. [He] has an unstable social history and prior criminality which includes being found guilty of first degree murder, later being granted parole and then committing a second

> murder. Both being female victims intimately associated with the prisoner. (Return 74-75)[1]

The Board quoted from a psychiatric report indicating a need for further observation and treatment. (Return 77). The Board concluded that "[u]ntil progress is made, [the prisoner] continues to be unpredictable and a threat to others." (Return 76).

The Board concluded that petitioner's next hearing would be held three years later, in July 1992.

DISCUSSIONS

A. EX POST FACTO APPLICATION OF PAROLE SUITABILITY STATUTE.

When petitioner pleaded nolo contendere to the second degree murder of Mrs. Washabaugh in 1980, California Penal Code § 3041.5(b)(2) required annual parole suitability hearings for prisoners who had not yet received parole release dates. In 1981, an amendment to section 3041.5 authorized the Board to schedule subsequent hearings up to three years apart in the case of a prisoner convicted of more than one offense involving the taking of a life. The Board has applied this three-year provision to petitioner. He contends this was an

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1. The Board's findings following the suitability hearing are submitted as exhibit 4 to the Return.

ex post facto application of law. (Petition 6; Memo 5, 8-9)[2/]

A penal law is ex post facto if 1) it is retrospective, applying to events that occurred before its enactment, and 2) it disadvantages the offender affected buy it. Weaver v. Graham, 450 U.S. 24, 29 (1981); Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990); Watson v. Estelle, 886 F.2d 1093, 1094 (9th Cir. 1989).

Respondent concedes the 1981 amendment to section 3041.5 was applied retrospectively to petitioner. (Return 22). The amendment is retrospective because it establishes a different timetable for parole eligibility hearings for defendants lie petitioner, who committed their crimes before its amendment. Watson, 886 F.2d at 1095; see also Weaver, 450 U.S. at 31.

A retrospective statute disadvantages the offender affected by it if it makes the punishment for a crime more burdensome after its commission. Collins, 110 S. Ct. at 2719 (citing Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)). Therefore, the issue is whether the 1981 amendment to section 3041.5 makes the punishment for petitioner's crime more burdensome.

The Supreme Court stated in dicta that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present [a] serious question under the ex post facto clause...." Warden v. Marrero, 417 U.S. 653 663 (1974).

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2. "Memo" refers to Petitioner's Memorandum of Points and Authorities in Support of Petition for Habeas Corpus, filed with the Petition.

Because parole eligibility is a part of the sentence imposed for a crime, many courts hold that ex post facto principles apply to retrospective statutes that affect parole eligibility. See Atkins v. Snow, 922 F.2d 1558, 1563, 1565 (11th Cir.), cert. denied, 111 S. Ct. 2915 (1991); Fender v. Thompson, 883 F.2d 303, 306 (4th Cir. 1989); Rodriguez v. United States Parole Comm'n, 594 F.2d 170, 176 (7th Cir. 1979); Tiller v. Klincar, 138 Ill.2d 1, 561 N.E.2d 576, 580 (Ill. 1990), cert. denied, 111 S. Ct. 688 (1991); Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898, 914-15, cert. denied, 111 S. Ct. 369 (1990); see also Weaver, 450 U.S. at 35-36 (applying ex post facto principles to sentence credits).

Recently the Eleventh Circuit and the Illinois Supreme Court considered the ex post facto effect of replacing an annual parole suitability hearing with a longer review period. Akins, 922 F.2d 1558; Tiller, 561 N.E.2d 576. In Akins, the statute was revised to require parole hearings once every eight years; in Tiller, the period was extended to once every three years. Akins, 922 F.2d at 1560; Tiller, 561 N.E.2d at 577-78. Both courts held that extending the time an inmate must spend in prison before he or she is reconsidered for parole substantially disadvantages the prisoner, and violates the ex post facto clause. Akins, 922 F.2d at 1564-65; Tiller, 561 N.E.2d at 580. The ex post facto effect of the Illinois statute was not ameliorated by requiring the parole board to find that parole was not likely to be granted during the interim three years. Tiller, 561 N.E.2d at 579-80.

Under Akins and Tiller, the application of the 1981 amendment to section 3041.5 to defer petitioner's next parole suitability hearing for three years is a violation of the ex post facto clause. The violation is not alleviated by the Board's

finding that petitioner was unlikely to be granted parole within the three-year interim period.

Respondent cites the Ninth Circuit's opinion in Watson, 886 F.2d 1093, as controlling this case because it involved the ex post facto effect of the 1981 amendment to California Penal Code § 3041.5. However, Watson committed his offenses in 1969, when there was no statutory guarantee on the frequency of parole suitability hearings. Id. at 1094. Because the key ex post facto inquiry is the actual state of the law at the time of the offense, Watson is inapplicable. See id. at 1096.

Respondent also argues the 1981 amendment to section 3041.5 is not ex post facto because it is merely a procedural change, citing In re Jackson, 39 Cal. 3d 464, 703 P.2d 100, 216 Cal. Rptr. 760 (9185), and Morris v. Castro, 166 Cal.App.3d 33, 212 Cal. Rptr. 299 (9185). These cases are not dispositive, however, because whether a state criminal statute violates the ex post facto clause is a federal question. See Weaver, 450 U.S. at 33; Watson, 886 F.2d at 1095.

Looking to federal law, the concurring opinion in Watson applied the procedural change analysis referred to by respondent, and found no ex post facto violation. Watson, 886 F.2d at 1100 (Marquez, J., concurring). Nonetheless, this analysis is weakened by current law. The Supreme Court has severely criticized the "procedural change" analysis, stating that the ex post facto clause may be violated by laws, "whatever their form," that increase punishment. Collins, 110 S. Ct. at 2721; see also Miller v. Florida, 482 U.S. 423, 433 (1987); Weaver, 450 U.S. at 29 N.12; Akins, 922 F.2d at 1564-65.

The 1981 amendment to section 3041.5, authorizing the Board to defer parole suitability hearings for three years, applies retrospectively and makes petitioner's punishment more burdensome. It is an ex post facto law prohibited by the Constitution. The proper relief for this ex post facto violation is to remand the case to permit the state court to apply the law in place when petitioner's crime occurred. Weaver, 450 U.S. at 36 n.22.

As discussed below, the remainder of petitioner's claims do not merit relief.

B. VOLUNTARINESS OF THE PLEA.

Petitioner next contends his nolo contendere plea was involuntary because the trial court failed to advise him that his prior murder conviction would affect his parole eligibility. (Petition 7). He also claims the prosecutor misrepresented the sentence by stating he would be paroled after serving ten years in prison (Memo 5), and he asserts he would not have pleaded nolo contendere if he had known that after serving ten years his parole might be denied based on his prior conviction. (Petition 7; Memo 5).

A plea of nolo contendere has the same legal effect as a guilty plea. Cal. Penal Code § 1016; see Hudson v. United States, 272 U.S. 451 455 (1926) Due process requires a guilty plea to be knowing and voluntary, entered with a sufficient awareness of the relevant circumstances and likely consequences of the plea. Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969) Whether a defendant subjectively understood the consequences

of his or her plea is a factual issue subject to a presumption of correctness when determined by a state court. Iaea v. Sunn, 800 F.2d 861, 866, 868 n.7 (9th Cir. 1986); United States v. Signori, 844 F.2d 635, 638 (9th Cir. 1988).

In this case, the state court expressly found petitioner understood the nature and consequences of his plea. (Return 199).[3/] Furthermore, the record of the plea proceeding reveals petitioner received the benefit of an informed plea bargain.

The prosecutor did not promise petitioner he would be paroled after ten years. Rather, he stated that if petitioner received the maximum post-conviction credit, his minimum sentence could be as little as ten years. (Return, Exh. 8, p. 109). But, the prosecutor further cautioned that petitioner might serve the maximum life term. (Return, Exh. 8, p. 109).

Petitioner was accurately informed about the length of his Sentence and the possibility of parole. The court's failure to explain the effect his prior conviction would have on his parole eligibility was not a violation of petitioner's federal constitutional rights. See Hill v. Lockhart, 474 U.S. 52, 56 (1985); Murphy v. McCormick, 724 F.Supp. 774, 778 (D. Mont. 1989); see also Doganiere v. United States, 914 F.2d 165, 167 (9th Cir. 1990), cert. denied, 111 S. Ct. 1398 (1991) (holding that a federal judge is not required to inform a defendant about parole eligibility before accepting a plea).

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3. The Reporter's Transcript of the plea proceeding is submitted as exhibit 8 to the Return.

C. TRIAL COURT ERRORS.

Petitioner alleges the trial judge violated his due process rights by committing certain errors. Generally, federal habeas relief is not available for an error by a state judge in the application of state law. Pulley v. Harris, 465 u.s. 37, 41 (1984); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). However, the error may be actionable if it rendered the proceedings so fundamentally unfair it violated federal due process. See Pulley, 465 U.S. at 41; Jammal, 926 F.2d at 919.

Petitioner first alleges the judge erred by failing to strike the special circumstance allegation concerning petitioner's prior conviction. (Petition 6, 7; Memo 10, 12). He believes this error permitted the Board to use the prior conviction to reach its decision to deny parole.

The transcripts of the plea and sentencing proceedings do not include a specific dismissal of the special circumstance charge. However, this failure does not amount to a violation of due process. Petitioner did not enter a plea to that charge, nor was sentence imposed on it. The Judgment states there was no finding on the special circumstance allegation. (Return 30). The Board's reliance on the prior conviction to deny petitioner's parole was appropriate under the regulations and was unrelated to the trial judge's actions. See Guzman v. Morris, 644 F.2d 1295, 1298 (9th Cir. 1981).

Petitioner next argues the judge failed to establish the factual basis for the plea or the reasons for the recommended plea agreement, as required by California Penal Code §§ 1192.5

and 1192.6. (Memo 5, 9). These alleged errors do not merit relief. Although it is good practice to establish the factual predicate for a plea on the record, it is not mandated by the Constitution. See United States v. Newman, 912 F.2d 1119, 1123 (9th Cir. 1990). Petitioner does not have standing to challenge the alleged error under section 1192.6. See People v. Gonzales, 188 Cal.App.3d 586, 590, 233 Cal.Rptr. 204 (1986).

Petitioner also contends that because the court stated he was sentenced "to state prison for 15 --," rather than "15 years to life," his indeterminate life sentence is invalid. (Memo 6, 9; Return 133). Petitioner's due process rights were not violated by the omission. As discussed above, petitioner understood he would receive a sentence of fifteen years to life. (Return 109). Further, this is the required sentence after a second degree murder conviction. Cal. Penal Code § 190.

These alleged errors by the trial judge do not constitute grounds for federal habeas relief. They did not render the plea proceedings or the conviction fundamentally unfair.

D. MINIMUM PAROLE ELIGIBILITY DATE.

Petitioner contends his due process rights were violated because the Board erroneously applied California's indeterminate sentencing law to him. He claims he received a determinate sentence, rather than an indeterminate life term. Under his determinate sentence, he is entitled to earn good-time credits, warranting his release on parole after service two-thirds of his minimum sentence of fifteen years. (Petition 7; Memo 6, 14-16; Traverse 11-13).

This claim involves the application of California sentencing and parole law. As discussed above, federal habeas relief is not available for an alleged violation of state law. Pulley, 465 U.S. at 41; Hernandez, 930 F.2d at 719; Jamal, 926 F.2d at 919. To the extent petitioner claims the state laws were arbitrarily interpreted and applied in violation of due process, they will be briefly examined.

To achieve uniformity in sentencing, California adopted a determinate sentencing scheme in 1977. Cal. Penal Code § 1170(a)(1); Guzman, 644 F.2d at 1296, but pursuant to a 1978 voter initiative, the penalty for a second degree murder was changed from a determinate sentence of five, six or seven years, to a mandatory indeterminate sentence of fifteen years to life. Cal. Penal Code § 190; see In re Dayan, 231 Cal.App.3d 184, 187, 282 Cal.Rptr. 269 (1991).

The sentencing court is not authorized to set the term or duration of the period of imprisonment for this crime. Cal. Penal Code § 1168(b); Dayan, 231 Cal.App.3d at 187. Instead, the Board has the authority to grant parole to defendants receiving indeterminate sentences. Cal. Penal Code §§ 3040, 3041.

Petitioner is correct that the California Department of Corrections may reduce his minimum term of fifteen years by one-third for good behavior. Cal. Penal Code §§ 190, 2931; see Brodheim v. Rowland, No. C 90-2892-TEH, 92 Daily Journal D.A.R. 2901, 2901 (N.D. Cal. Nov. 6, 1991); Dayan, 231 Cal.App.3d at 188, 189. This good-time credit is applied

to calculate petitioner's minimum parole eligibility date. Cal. Code Regs. tit. 15, § 2400; Dayan, 231 Cal.App.3d at 18.

But eligibility for parole does not equate to mandatory release on the minimum eligibility date. A parole release date will not be set until the Board determines petitioner is suitable for parole. Cal. Code Regs. tit. 15, §§ 2280-81, 2401-02; In re Stanworth, 33 Cal.3d 176, 183, 654 P.2d 1311, 187 Cal.Rptr. 783 (1982). Once he is found suitable, the Board will determine the amount of credit to be applied to his actual sentence pursuant to its regulations. See Cal. Code Regs. tit. 15, §§ 2290, 2400, 2410; Stanworth, 33 Cal.3d at 185-86; Dayan, 231 Cal.App.3d at 189.

California law has not been arbitrarily applied. Because petitioner received an indeterminate life sentence, the Board must find him suitable for parole before a parole release date will be assigned.

E. PAROLE SUITABILITY DETERMINATION.

Next, petitioner contends the Board violated his due process rights by basing its denial of parole on false and improper evidence. He asserts the following factors were wrongfully considered: his prior conviction for first degree murder; false testimony provided by the prison psychiatrist; false information presented in petitioner's probation report; assumed facts about the nature of the crime; and fabricated testimony from a prison informant. (Petition 6; Memo 4, 5-6, 7, 10-13, 17-22).

A federal court's review of a parole board's suitability decision is very limited. Pedro v. Oregon Parole Bd., 825 F.2d

1396, 1399 (9th Cir. 1987), cert. denied, 484 U.S. 1017 (1988). Assuming the California parole statute creates a protected liberty interest in early release, the requirements of due process are satisfied if some evidence supports the Board's decision to deny parole. Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); see also Superintendent v. Hill, 472 U.S. 445, 455 (1985); Pedro, 825 F.2d at 1399; In re Powell, 45 Cal.3d 894, 904, 755 P.2d 881, 248 Cal.Rptr. 431 (1988). In addition, the evidence must have some indicia of reliability. Jancsek, 833 F.2d at 1390; Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987).

Due process was satisfied in petitioner's case because there was considerable evidence supporting the Board's decision. The Board considered the manner of petitioner's offense, his previous record of violence, his unstable social history, and his psychological status. All of these factors are persuasive and proper considerations. See Cal. Code Regs. tit. 15, §§ 2281, 2402. In particular, the Board properly considered petitioner's prior conviction in reaching its decision. See Guzman, 644 F.2d at 1298.

There is no reason to believe the facts and reports relied upon by the Board lacked sufficient indicia of reliability. See Jancsek, 833 F.2d at 1390; Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987).

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proper considerations. See Cal. Code Regs. tit. 15, §§ 2281, 2402. In particular, the Board properly considered petitioner's prior conviction in reaching its decision. See Guzman, 644 F.2d at 1298.

There is no reason to believe the facts and reports relied upon by the Board lacked sufficient indicia of reliability. See Jancsek, 833 F.2d at 1390; see also Montgomery v. U.S. Parole Comm'n, 838 F.2d 299, 301 (8th Cir. 1988) (per curiam) (holding that a federal court will not reassess the credibility of the information used by the federal Parole Commission).

It is not necessary to examine the prison informant's testimony because there is no mention of it in either the response of the probation officer or the Board's report.

F. EX POST FACTO APPLICATION OF PAROLE ELIGIBILITY MATRIX.

Next, petitioner contends the Board's use of a matrix of base terms to determine his eligibility for parole was an ex post facto application of law. (Memo 5). This claim lacks merit because the Board did not utilize a matrix in its decision. A matrix is used to establish a base term for a prisoner who is found suitable for parole. Cal. Code Regs. tit. 15, §§ 2282, 2403. A matrix was not applied in petitioner's case because he has not yet been found suitable for parole.

G. PSYCHIATRIC TREATMENT.

Petitioner asserts his Eighth Amendment rights were violated by the Board's recommendation that he participate in

psychiatric treatment before his next parole suitability hearing. He believes the treatment will be used by the Board as another basis for denying his parole. (Memo 7a; Traverse 16; Return 78).

The Court ordered additional briefing on the issue.

As argued by respondent, the Board properly concluded that petitioner could benefit from participation in an alcohol abuse program. See Superintendent v. Hill, 472 U.S. 445, 447, 105 S.Ct. 2768, 274, 86 L.Ed.2d 356 (1985).

Thus, there is no merit to petitioner's allegation that such treatment will be used as a basis for denying parole.

CONCLUSION

The Magistrate Judge recommends the District Judge issue an order:

1) granting the petition in part, and remanding the case to permit the state court to reschedule petitioner's subsequent parole suitability hearing dates pursuant to the version of California Penal Code § 3041.5 in effect when petitioner's crime occurred; and

2) denying the petition and dismissing this action with prejudice as to all other claims.

DATED: May 18, 1992

VENETTA S. TASSOPULOS
United States Magistrate Judge

SUPPLEMENTAL APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES, Petitioner, v. DIRECTOR OF CORRECTIONS AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents.	No. CV 91-699-HLH(T) ORDER ADOPTING IN PART AND REJECTING IN PART THE RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has reviewed the petition, all of the records and files herein, the Report and Recommendation of Magistrate Judge, and the objections to the Magistrate Judge's Report and Recommendation filed herein. After making a de novo determination, the Court adopts the findings and conclusions of Magistrate Judge except for the portion pertaining to the application of the Ex Post Facto Clause.

Petitioner was convicted of first degree murder in 1970. He was sentenced to life imprisonment and paroled in 1980. In

July 1982, petitioner pled nolo contendere to a second degree murder charge. Prior to 1981, California Penal Code § 3041.5(b)(2) required annual suitability hearings for prisoners who had not yet received parole release dates. In 1981, after the second murder had already been committed, § 3041.5(b)(2) was amended to permit the Parole Board to schedule subsequent parole hearings up to three years apart in cases where (1) the prisoner had been convicted of more than one murder and (2) the Board found that it was not reasonable to expect that the prisoner would be found suitable for parole in the interim. The Parole Board applied this three year provision to petitioner. Petitioner asserts that the application of amended § 3041.5(b)(2) was a violation of the Ex Post Facto Clause.

In her excellent Report and Recommendation, the Magistrate Judge recommended that the Court find that the Ex Post Facto Clause was violated by the application of § 3041.5(b)(2) to a prisoner, such as Petitioner Morales, where the second murder was committed before the date of the amendment. The Court disagrees. An amendment to a law that is procedural does not violate the Ex Post Facto Clause even if it disadvantages the accused. Collins v. Youngblood, 497 U.S. - , 110 S.Ct. -, 111 L.Ed.2d 30, 36 (190). In Collins, the United States Supreme Court applied the procedural change exception to a sentence reformation statute. In the Collins case, the defendant was convicted of aggravated sexual abuse and sentenced by a jury to life imprisonment and a $10,000 fine, but the fine was later deemed improper. At the time the crime was committed, such a jury error constituted grounds for a new trial. By the time of sentencing, however, the law had been changed to allow reformation of a jury verdict. The

defendant claimed that he was entitled to a new trial and that application of the amended law to him would violate the Ex Post Facto Clause. The Court held that reformation of a verdict was merely a procedural change and thus not a violation of the Ex Post Facto Clause.

The Court defined a procedural change as a change "in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." Id. at 40. While the Court acknowledged the Ex Post Facto Clause is violated by any laws "'whatever their form', which make innocent acts criminal, alter the nature of the offense, or increase the punishment,' it criticized causes that sought to enlarge the Clause by extending it, without explanation, to "substantial protections with which the existing law surrounds the person accused of crime" or to laws that infringe upon "substantial personal rights." Id. at 40-41, 44. In doing so, the Court clarified that procedural changes remained outside the prohibitions of the Ex Post Facto Clause.

Recognizing this procedural change exception, the California courts have held that the amendment of Penal Code § 3041.5 is merely a procedural change and thus not a violation of the Ex Post Facto Clause. Morris v. Castro, 166 Cal.App-.3d 33, 212 Cal.Rptr. 299 (1985); In re Jackson, 39 Cal.3d 464, 216 Cal.Rptr. 760 (1985). As the Magistrate Judge notes, the court is not bound by these cases since this is a federal issue,[1] their reasoning is persuasive. For instance, in Morris,

1. See Weaver v. Graham, 450 U.S. 24, 33, 101 S.Ct. 960, 67 L.Ed.2d 17, 25 (1981); Watson v. Estelle, 886 F.2d 1093, 1095 (9th Cir. 1989).

suitability hearing for two or three years was "no arbitrary decision" as it was made only after a full hearing and review of the inmate's criminal history, commitment offense, attitude toward his crime, behavior in prison, psychological and rehabilitation problems, age, parole plans and marketable skills. Morris, 166 Cal.App.3d at 38. Thus, the court concluded that "changes permitted by the amended statute are proper administrative and procedural methods for dealing with respondent life prisoners, who . . . committed multiple murder, and all of whom has demonstrated that they are unsuitable candidates for parole." Id. in Jackson, the California Supreme Court also found that the amendment to Penal Code § 3041.5 was a procedural change because it does not alter the criteria by which parole suitability is determined, nor does it deprive the inmate of the right to a parole suitability hearing. Jackson, 39 Cal.3d at 473-474.

The Magistrate Judge in her Recommendations relied on Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), the most analogous federal case.

The court believes that Akins is distinguishable. In Akins, the Eleventh Circuit held that the Ex Post Facto Clause was violated by an amendment to a criminal statute that allowed parole hearings every eight years, instead of annually, for prisoners convicted of multiple murders. The period of review involved in Akins is a substantially greater extension of time (eight years) than that in Penal Code § 3041.5 (three years). This disparity is significant, for it is more difficult to predict a prisoner's parole eligibility for eight year periods than for three year periods. More important, Penal Code § 3041.5 has procedural safeguards to ensure that the prisoner receives a

fair eligibility assessment. If the Board plans to postpone annual review, in addition to evaluating the prisoner on the normal suitability criteria, it must also attach a "statement of reasons." Jackson, 39 Cal.3d at 477. Thus, it is unlikely that California's new procedure will impair any prisoner's substantial rights. In Akins, on the other hand, there is no analysis of whether the parole suitability criteria changed with the extension of the parole review hearing.

The Court finds, therefore, that the amendment of Penal Code § 3014.5(b)(2) was a procedural change that does not impair the petitioner's substantive rights nor violate the Ex Post Facto Clause. Accordingly, the Petition for Writ of Habeas Corpus is hereby dismissed. Judgment to enter dismissing the petition.

IT IS SO ORDERED.

DATED: August 20, 1992.

HARRY L. HUPP
United States District Judge

SUPPLEMENTAL APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES, Petitioner, v. DIRECTOR OF CORRECTIONS AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents.	No. CV 91-699-HLH(T) JUDGMENT DISMISSING HABEAS CORPUS ACTION

Pursuant to Order adopting in part and rejecting in part the recommendation of Magistrate Judge, the subject habeas corpus petition is hereby dismissed in its entirety.

IT IS SO ORDERED.

DATED: August 20, 1992.

HARRY L. HUPP
United States District Judge

ORIGINAL

Jose Morales, #B-33187
Mule Creek State Prison
P.O. Box 409000; CG-156L
Ione, CA 95640
May 30, 1994

Mr. William K. Suter, Clerk
Supreme Court of the U.S.
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

DEAR Mr. Sutter:

Re: Docket No. 93-1462

This will acknowledge receipt of your letter dated May 10, 1994 of which was received by the undersigned on May 28, 1994.

You are requesting that I respond to the California Attorney General's Petition for Writ of Certiorari where no Certiorari has been granted. I consider this to be rather unusual. The government is never asked to respond when prisoners file Certiorari petitions in propria persona before this court. Your request is rather strange to say the least.

In any event, I'm an uneducated convicted felon and an indigent who has never practiced law before the United States Supreme Court. I would not know how to file an informal response to the California Attorney General's petition for writ of certiorari.

Enclosed please find an Ex Parte Motion for Appointment of Counsel to research, brief, submit and argue the merits of the California State Attorney's Petition for Writ of Certiorari before the Supreme Court of the United States.

My understanding of the U.S. Supreme Court procedures is that you either grant or deny certiorari to the petitioning litigant. I'm not familiar or aware of any secret or informal responses to be submitted outside a direct court order, ordering that a certiorari be granted, attorneys appointed and briefs be submitted.

Whatever scheming is going on with you and Deputy Attorney General James Ching should be brought out in the open and made public. Rule 33 of the Federal Rules of Civil Procedures makes reference to "Interrogatories to Parties." Why should I submit or respond to the government's interrogatory request. That is, especially since I was coerced to plead guilty to a case with false and fabricated fingerprint evidence.? Had I known that I was being deceived into accepting a guilty plea because the prosecution knew that he was setting me up with false fingerprints from a hand that did not belong to the victim in the 1980 case, I would not have accepted to plead guilty to the crime of murder in the second degree. James Ching and his Los Angeles District Attorneys and police responsible for fabricating false fingerprint evidence against me, all need to be arrested and prosecuted by the U.S. Justice Department.

Respectfully Submitted
Jose Morales
JOSE MORALES, #B-33187

cc: James Ching, DAG

8 pp

Jose Ramon Morales , #B-33187
Mule Creek State Prison
P.O. Box 409000; CG-156L
Ione, CA 95640

In Propria Persona

SUPREME COURT OF THE UNITED STATES

WASHINGTON, DISTRICT OF COLUMBIA

JOSE RAMON MORALES , Plaintiff ,

-vs-

CAILF. DEPARTMENT OF CORRECTIONS , Defendant .

CASE NO: 93-1462

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL

TO: THE HONORABLE COURT IN THE ABOVE CAUSE OF ACTION:

NOW COMES, JOSE RAMON MORALES , defendant in the above cause of action who moves this court for an Ex Parte Order for Appointment of Counsel to represent defendant's interest in the above bona fide legal action and for which defendant has no other means to gain meaningful access to the courts due to incarcerated status of indigent defendant herein.

This motion is based on this Ex Parte Motion, on the attached declaration, on the memorandum of points and authorities herein, on the papers and records filed in this matter and on such other evidence presented to the court in support of this motion.

DATED: MAY 30, 1994

RESPECTFULLY SUBMITTED:

JOSE RAMON MORALES

DECLARATION OF JOSE MORALES

1. That I am the defendant in the within bona fide legal cause of action, am a poor indigent incarcerated prisoner, and have at risk threatened personal and/or property rights as a result of the within cause of action;

2. That declarant is a layperson, untrained in law, and as a result of poor, indigent, and incarcerated status is barred from access to the courts to protect personal and/or property rights as guaranteed by due process and equal protection clauses of both the state and federal constitutions;

3. That declarant is forced to represent self in defense of the within suit, is without funds to employ counsel, and has no legal training, experience, access to legal materials and/or access to the courts necessary to adequately and reasonably protect declarant's present and future personal and/or property rights;

4. That declarant is being harrassed by plaintiff herein in as much as declarant is indigent and incarcerated, unable to retain an attorney, and that without adequate representation and meaningful access to the courts declarant is likely to suffer adverse judgement and therefrom a significant issue of liability would arise impacting declarant's personal and/or property rights both present and in the future;

5. That declarant has been incarcerated since July 22, 1982 and will remain incarcerated through approximately FOREVER, 19____;

6. That as a right guaranteed by the due process and equal protection clauses of the state and federal constitutions declarant has a right to the appointment of legal counsel in the

within cause of action based upon: (a) declarant is confronted with a bona fide legal action threatening personal and/or property interest, (b) declarant is indigent and in prison, (c) declarant plans to defend from the action herein, and (d) adverse judgement would affect declarant's present and/or future property rights;

7. That declarant is entitled to the appointment of counsel and declarant does declare that such appointed counsel should be awarded legal fees in accordance with standards within the community for similar cases;

8. That attorney fees should be ordered by this court to be paid pursuant to, but not limited to, (a) Business and Professions Code, Section 6210, (b) Government Code, Section 27706, and/or (c) legal duty and obligation of law enforcement/correctional agency to provide for the constitutionally mandated needs of wards remanded to custody;

9. That without relief requested herein that declarant will continue to suffer deprivations of constitutional and/or other legal rights as stated above.

VERIFICATION

I have read the above statements and do declare upon penalty of perjury that these statements are true and correct as based upon information and belief. Executed this 30th day of May, 1984 at Mule Creek Prison California pursuant to Code of Civil Procedure, Sections 446 and 2015.5.

DECLARANT

POINTS AND AUTHORITIES

I

INDIGENT PRISONER WHO FACES BONA FIDE LEGAL ACTION THREATENING INTEREST IS ENTITLED TO ACCESS TO COURTS AS GUARANTEED BY DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTIONS OF CALIFORNIA AND THE UNITED STATES. Yarbrough v. Superior Court, (1985) 39 C.3d 197; Payne v. Superior Court, (1976) 17 C.3d 908.

It is uncontrovertible that defendant herein is inprisoned, is indigent without funds to employ counsel, and faces a bona fide legal action threatening personal and/or property interest by virtue of having to defend from this suit. Further, defendant is acting Pro Per in own defense without adequate training or experience, is without adequate access to legal materials, and is without meaningful and/or viable access to the courts. Woods v. Superior Court, (1974) 36 CA3d 811, Yarbrough v. Superior Court, (supra) 39 c.3d 197.

II

INDIGENT PRISONER WHO IS UNTRAINED AND/OR INEXPERIENCED IN CIVIL LAW SHOULD BE APPOINTED COUNSEL. Payne v. Superior Court, (supra) 17 c.3d 908.

In light of this bona fide legal action threatening defendant's personal and/or property rights, the court must appoint legal counsel in the instant case. Yarbrough v Superior Court, (supra) 39 C.3d 197, 204.

Before denial of defendant's motion this court must at minimum hold a hearing and/or make factual determination using guidelines set down by the California Supreme Court in Payne. Payne v. Superior Court, (supra) 17 c.3d 908, 924; Yarbrough v. Superior Court, (supra) 39 c.3d 197, 203-204, 207.

/////

III

THE DECISIONS OF THE SUPREME COURT AND COURT OF APPEAL ARE BINDING AND MUST BE ACCEPTED BY THE TRIAL COURTS. Woods v. Superior Court, (supra) 36 CA 3d 811, 814; Auto Equity Sales, Inc. v. Superior Court, ( ) 57 C.2d 450, 455.

The rule of stare decisis is a rule of jurisdiction. Auto Equity Sales, Inc. v. Superior Court, (supra), citing Abelleria v. Distict Court of Appeal, ( ) 17 C.2d 280, 288.

IV

ATTORNEYS FEES SHOULD BE ORDERED PAID BY THIS COURT. 6th, 13th, and 14th Amendments to the United States Constitution.

It stands to reason that if defendant is entitled to court appointed counsel, that such counsel is entitled to adequate and reasonable compensation equal to that afforded others in the community for similar services. 13th and 14th Amendments to United States constitution; Yarbrough v. Superior Court, (supra) 39 C.3d 197, desent at 207 and continuing be Chief Justice Bird.

This court should order funds be provided from appropriate sources including, but not limited to, provisions pursuant to Business and Professions Code, Section 6210; Government Code, Section 27706; from the law enforcement/correctional agency of custody which is legal mandated to provided for constitutionally required needs of defendant just as food, clothing, shelter, medical and other needs must be provided for. Defendant's legal needs are simply an extension of other constitutionally protected rights which serves both the needs of the individual and society at large. Indeed, for the state to allow personal and/or property rights to be violated, which in this case could have far reaching impact on defendant's future earning and family ties, would transgress the

constitution. Under circumstances as presented herein surely the state should afford defendant the protection afforded in criminal proceedings leading to incarceration or the in prison repair of an ingrown hangnail, contact visitation, mail censorship, or religious practice.

V

LEGAL PAPERS SUBMITTED BY INDIGENT PRO PER PRISONER UNTRAINED IN LAW MUST BE HELD TO LESS STRIGENT STANDARDS THEN THOSE DRAFTED BY MEMBERS OF THE BAR AND MUST BE VIEWED IN LIGHT MOST FAVORABLE TO PRO PER. Haines v. Kerner, (1972) 404 U.S. 519; 92 s. Ct. 594.

CONCLUSION

Defendant to this suit is an indigent prisoner who is untrained in law and being denied meaningful access to the courts. Defendant has a constitutional right to meaningful access to the courts and to appointment of legal counsel to protect personal and/or property rights which are threatened by this bona fide legal action. Defendant further enjoys the right to have legal counsel compensated by whatever means ordered by this court.

PRAYER

WHEREFORE, Good Cause having been shown, this court should grant the motion as follows:

1. declare defendant's rights as to issues raised herein;

2. order appointment of counsel to defend defendant in the above cause of action;

3. order the payment of counsel appointed herein a sum customary for such a case within the community to be paid from a source determined by the court;

4. in the alternative, hold hearing(s) and/or otherwise

make findings of fact as to issues pretaining to appointment and compensation of counsel to defend defendant in this suit;

5. order that all records pretaining to this motion be sealed subject to inspection only upon order of this court after a showing of good cause;

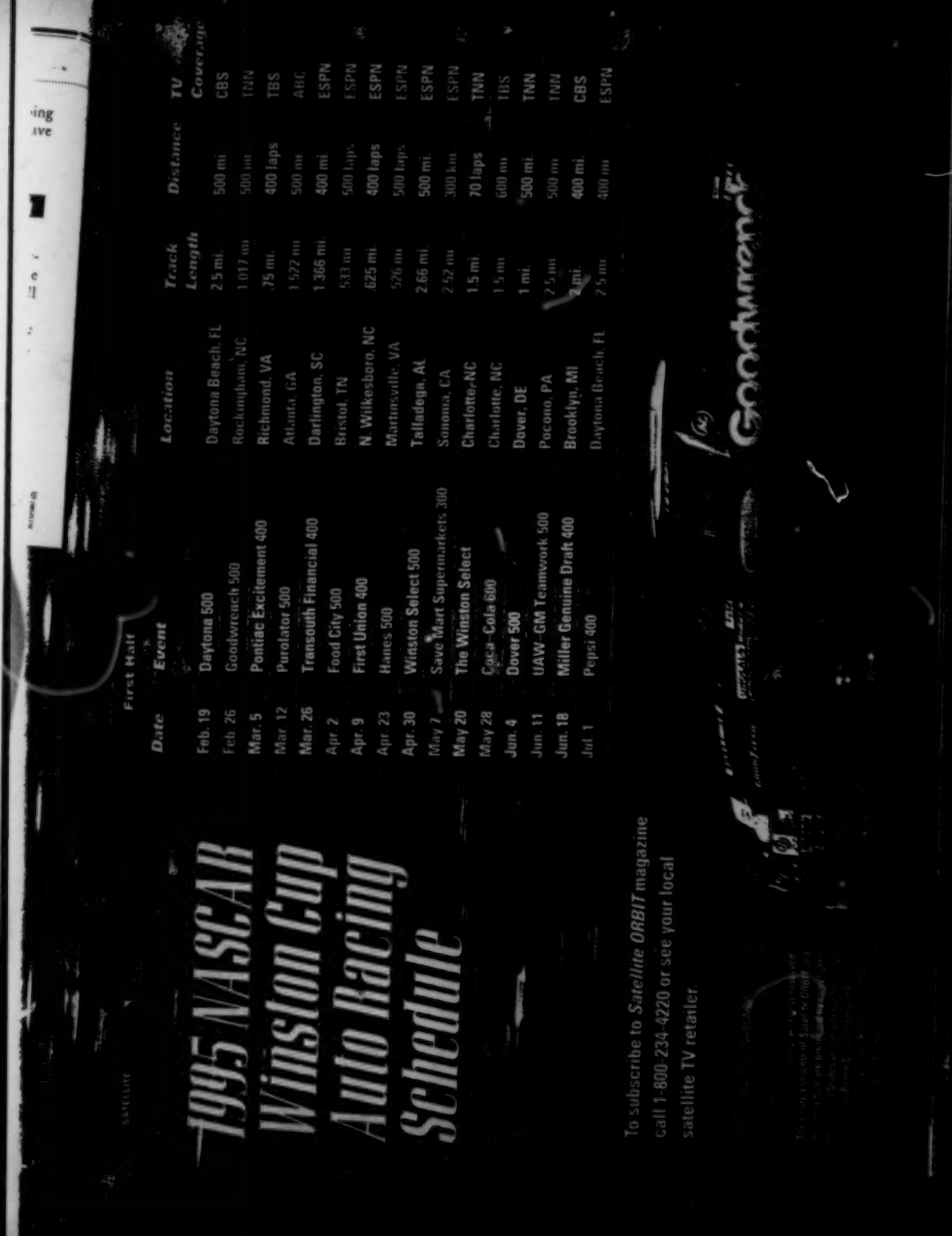
6. order such other and further relief as is just, proper and equitable.

DATED: _____

RESPECTFULLY SUBMITTE:

_____

DEFENDANT
IN PRO PER



1995 NASCAR Winston Cup Auto Racing Schedule

Second Half

Date	Event	Location	Track Length	Distance	TV Coverage
Jul. 9	Slick 50 300	Loudon, NH	1.058 mi.	300 laps	TNN
Jul. 16	Miller Genuine Draft 500	Pocono, PA	2.5 mi.	500 mi.	TBS
Jul. 23	Diehard 500	Talladega, AL	2.66 mi.	500 mi.	CBS
Aug. 5	Brickyard 400	Indianapolis, IN	2.5 mi.	400 mi.	ABC
Aug. 13	The Bud at the Glen	Watkins Glen, NY	2.45 mi.	90 laps	ESPN
Aug. 20	GM Goodwrench Dealer 400	Brooklyn, MI	2 mi.	400 mi.	ESPN
Aug. 26	Goody's 500	Bristol, TN	.533 mi.	500 laps	ESPN
Sept. 3	Mountain Dew Southern 500	Darlington, SC	1.366 mi.	500 mi.	ESPN
Sept. 9	Miller Genuine Draft 400	Richmond, VA	.75 mi.	400 laps	TBS
Sept. 17	Dover Downs 500	Dover, DE	1 mi.	500 mi.	TNN
Sept. 24	Goody's 500	Martinsville, VA	.526 mi.	500 laps	ESPN
Oct. 1	Tyson Holly Farms 400	N. Wilkesboro, NC	.625 mi.	400 laps	ESPN
Oct. 8	UAW–GM 500	Charlotte, NC	1.5 mi.	500 mi.	TBS
Oct. 22	AC–Delco 400	Rockingham, NC	1.017 mi.	400 mi.	TNN
Oct. 29	Slick 50 500	Phoenix, AZ	1 mi.	500 km.	TNN
Nov. 12	NAPA 500	Atlanta, GA	1.522 mi.	500 mi.	ESPN

Where to Watch

Satellite TV Networks: ABC (S3, 8 & 18; F1, 2; G4, 10). CBS (F1, 6; S4, 4 & 12; G4, 14). ESPN (G5, 9). TBS (G5, 6) and TNN (G5, 18). Wild feeds for races may be found on G7, T1, G3, G2 and Ku-band satellites. For race broadcast times, see *Satellite ORBIT*'s NASCAR auto racing listings every month in the Sports section (yellow pages).

No. 93-1462

In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSE RAMON MORALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

DANIEL E. LUNGREN, Attorney General of the State of California
GEORGE WILLIAMSON, Chief Assistant Attorney General
KENNETH C. YOUNG, Senior Assistant Attorney General
JOAN W. CAVANAGH, Supervising Deputy Attorney General
JAMES CHING, Supervising Deputy Attorney General
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Attorneys for Respondent

Petition For Certiorari Filed March 7, 1994
Certiorari Granted September 28, 1994

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OR CALL COLLECT (402) 342-2831

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March 5, 1992 – Traverse

April 17, 1992 – Order re Supplemental Response

May 20, 1992 – Traverse

May 18, 1992 – Report and Recommendations of Magistrate Judge

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February 9, 1994 – Opinion of the Court

STATUTE OF 1976

CHAPTER 1139

* * *

[Approved by Governor September 20, 1976. Filed with Secretary of State September 21, 1976.]

The people of the State of California do enact as follows:

* * *

SEC. 281.8. Section 3041.5 is added to the Penal Code, to read:

3041.5. (a) At all meetings held for the purpose of reviewing a prisoner's parole eligibility, or the setting, postponing or rescinding of parole dates, or evaluating the prisoner's appeal of good-time denial.

(1) The prisoner shall be permitted to review his or her file which will be examined by the Community Release Board at least 10 days prior to any hearing by such board and shall have the opportunity to enter a written response to any material contained in such file.

(2) The prisoner shall be permitted to be present, to ask and answer questions, and to speak on his own behalf.

(3) He shall receive the undivided attention of all the board members who will vote on any decision concerning him.

(4) A person designated by the Department of Corrections shall be present to insure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures.

(5) The prisoner shall be permitted to request and receive a stenographic record of all proceedings.

(b) (1) Within 10 days following any meeting where a parole date has been set, the board shall send the prisoner a written statement setting forth his parole date, the conditions he must meet in order to be released on the date set, and the consequences of failure to meet such conditions.

(2) Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; at what time the prisoner can reasonably expect to be considered for the setting of a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated. The board shall review each such case before the inmate's statutory minimum eligible release date and annually thereafter.

(3) Within 10 days of any board action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new date and the reason or reasons for such action and shall offer the prisoner an opportunity for review of such action within 90 days of the time the prisoner receives the statement.

(4) Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for such action, shall offer the prisoner an opportunity for review of such action and

shall, within six months, set the prisoner's parole release date in accord with the provisions of Section 3041 and this section.

* * *

STATUTES OF 1981

* * *

CHAPTER 1111

An act to amend Sections 1170, 1203.01, 3000, and 3041.5 of, and to add Section 3058.5 to, the Penal Code, and to add Section 1180 to the Welfare and Institutions Code, relating to parole.

[Approved by Governor October 1, 1981. Filed with Secretary of State October 2, 1981.]

The people of the State of California do enact as follows:

* * *

SEC. 4. Section 3041.5 of the Penal Code is amended to read:

3041.5. (a) At all hearings for the purpose of reviewing a prisoner's parole suitability, or the setting, postponing or rescinding of parole dates:

(1) At least 10 days prior to any hearing by the Board of Prison Terms, the prisoner shall be permitted to review his or her file which will be examined by the board and shall have the opportunity to enter a written response to any material contained in such file.

(2) The prisoner shall be permitted to be present, to ask and answer questions, and to speak on his own behalf.

(3) Unless legal counsel is required by some other provision of law, a person designated by the Department of Corrections shall be present to insure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that

have not been resolved by departmental or other procedures.

(4) The prisoner shall be permitted to request and receive a stenographic record of all proceedings.

(5) If the hearing is for the purpose of postponing or rescinding of parole dates, the prisoner will have rights set forth in paragraphs (3) and (5) of subdivision (a) of Section 2932.

(b) (1) Within 10 days following any meeting where a parole date has been set, the board shall send the prisoner a written statement setting forth his parole date, the conditions he must meet in order to be released on the date set, and the consequences of failure to meet such conditions.

(2) Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated.

The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

(3) Within 10 days of any board action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new date and the reason or reasons for such action and shall offer the prisoner an opportunity for review of such action.

(4) Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for such action and shall, within six months, set the prisoner's parole release date in accord with the provisions of Section 3041 and this section.

* * *

STATUTES OF 1986

CHAPTER 248

* * *

[Approved by Governor July 2, 1986. Filed with Secretary of State July 2, 1986.]

The people of the State of California do enact as follows:

* * *

SEC. 166. Section 3041.5 of the Penal Code is amended to read:

3041.5. (a) At all hearings for the purpose of reviewing a prisoner's parole suitability, or the setting, postponing or rescinding of parole dates:

(1) At least 10 days prior to any hearing by the Board of Prison Terms, the prisoner shall be permitted to review his or her file which will be examined by the board and shall have the opportunity to enter a written response to any material contained in such file.

(2) The prisoner shall be permitted to be present, to ask and answer questions, and to speak on his own behalf.

(3) Unless legal counsel is required by some other provision of law, a person designated by the Department of Corrections shall be present to insure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures.

(4) The prisoner shall be permitted to request and receive a stenographic record of all proceedings.

(5) If the hearing is for the purpose of postponing or rescinding of parole dates, the prisoner will have rights set forth in paragraphs (3) and (4) of subdivision (c) Of Section 2932.

(b) (1) Within 10 days following any meeting where a parole date has been set, the board shall send the prisoner a written statement setting forth his parole date, the conditions he must meet in order to be released on the date set, and the consequences of failure to meet such conditions.

(2) Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated.

The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than (A) two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding or, (B) three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

(3) Within 10 days of any board action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new ate and the reason or reasons for such action and shall offer the prisoner an opportunity for review of that action.

(4) Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for that action, and shall schedule the prisoner's next hearing within 12 months and in accordance with paragraph (2).

* * *

STATUTES OF 1990

CHAPTER 1053

An act to amend Section 3041.5 of the Penal Code, relating to prisoners.

[Approved by Governor September 18, 1990. Filed with Secretary of State September 19, 1990.]

LEGISLATIVE COUNSEL'S DIGEST

SB 2516, Presley. Prisoners.

Existing law provides for designated procedures at all hearings by the Board of Prison Terms for the purpose of reviewing a prisoner's suitability, or the setting, postponing, or rescinding of parole dates.

Existing law requires that the board hear each case annually except, the board may schedule the next hearing no later than 2 years after any hearing at which parole is denied if the board finds it is not reasonable to expect that parole would be granted at a hearing during the following year and states the basis for the finding, or 3 years after any hearing at which parole is denied if the prisoner has been convicted of more than on offense which involves the taking of a life and the board makes those findings.

This bill would, in addition, permit the board to schedule the next hearing no later than 5 years after any hearing at which parole is denied if the prisoner has been convicted of more than 2 murders and the board makes specified findings.

This bill would also make this provision applicable only to offenses committed before July 1, 1977, or on or after January 1, 1991.

The people of the State of California do enact as follows:

SECTION 1. Section 3041.5 of the Penal Code is amended to read:

3041.5. (a) At all hearings for the purpose of reviewing a prisoner's parole suitability, or the setting, postponing, or rescinding of parole dates, the following shall apply:

(1) At least 10 days prior to any hearing by the Board of Prison Terms, the prisoner shall be permitted to review his or her file which will be examined by the board and shall have the opportunity to enter a written response to any material contained in the file.

(2) The prisoner shall be permitted to be present, to ask and answer questions, and to speak on his or her own behalf.

(3) Unless legal counsel is required by some other provision of law, a person designated by the Department of Corrections shall be present to insure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures.

(4) The prisoner shall be permitted to request and receive a stenographic record of all proceedings.

(5) If the hearing is for the purpose of postponing or rescinding of parole dates, the prisoner shall have rights set forth in paragraphs (3) and (4) of subdivision (c) of Section 2932.

(b) (1) Within 10 days following any meeting where a parole date has been set, the board shall send the prisoner a written statement setting forth his or her parole date, the conditions he or she must meet in order to be released on the date set, and the consequences of failure to meet those conditions.

(2) Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated.

The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than the following:

(A) Two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the bases for the finding.

(B) Three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at

a hearing during the following years and states the basis for the finding.

(C) Five years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than two murders, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding in writing. If the board defers a hearing five years, the prisoner's central file shall be reviewed by a deputy commissioner within three years at which time the deputy commissioner may direct that a hearing be held within one year. The prisoner shall be notified in writing of the deputy commissioner's decision.

(3) Within 10 days of any board action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new date and the reason or reasons for that action and shall offer the prisoner an opportunity for review of that action.

(4) Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for that action, and shall schedule the prisoner's next hearing within 12 months and in accordance with paragraph (2).

SEC. 2. The amendment to Section 3041.5 of the Penal Code made by this act shall be applicable only to offenses committed before July 1, 1977, or on or after January 1, 1991.

STATUTES OF 1994

CHAPTER 560

An act to amend Section 3041.5 of the Penal Code, relating to parole.

[Approved by Governor September 15, 1994. Filed with Secretary of State September 16, 1994.]

LEGISLATIVE COUNSEL'S DIGEST

SB 826, Leonard. Parole.

Under existing law, if a prisoner is denied parole, the Board of Prison Terms is required to hear the prisoner's case no later than 2 years after the hearing denying parole. If the prisoner has been convicted of more than one offense than involves the taking of a life, the parole hearing must be held no later than 3 years if the prisoner has been convicted of more than 2 murders, as specified.

This bill would instead require that the hearing be held no later than up to 5 years after the hearing denying parole if the prisoner has been convicted of murder.

The people of the State of California do enact as follows:

SECTION 1. Section 3041.5 of the Penal Code is amended to read:

3041.5. (a) At all hearings for the purpose of reviewing a prisoner's parole suitability, or the setting, postponing, or rescinding of parole dates, the following shall apply:

(1) At least 10 days prior to any hearing by the Board of Prison Terms, the prisoner shall be permitted to review his or her file which will be examined by the board and shall have the opportunity to enter a written response to any material contained in the file.

(2) The prisoner shall be permitted to be present, to ask and answer questions, and to speak on his or her own behalf.

(3) Unless legal counsel is required by some other provision of law, a person designated by the Department of Corrections shall be present to insure that all facts relevant to the decision be presented, including, if necessary, contradictory assertions as to matters of fact that have not been resolved by departmental or other procedures.

(4) The prisoner shall be permitted to request and receive a stenographic record of all proceedings.

(5) If the hearing is for the purpose of postponing or rescinding of parole dates, the prisoner shall have rights set forth in paragraphs (3) and (4) of subdivision (c) of Section 2932.

(b) (1) Within 10 days following any meeting where a parole date has been set, the board shall send the prisoner a written statement setting forth his or her parole date, the conditions he or she must meet in order to be released on the date set, and the consequences of failure to meet those conditions.

(2) Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the

prisoner a written statement setting forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated.

The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than the following:

(A) Two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at the hearing during the following year and states the bases for the finding.

(B) Up to five years after any hearing at which parole is denied if the prisoner has been convicted of murder, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding in writing. If the board defers a hearing five years, the prisoner's central file shall be reviewed by a deputy commissioner within three years at which time the deputy commissioner may direct that a hearing be held within one year. The prisoner shall be notified in writing of the deputy commissioner's decision. The board shall adopt procedures that relate to the criteria for setting the hearing between two and five years.

(3) Within 10 days of any board action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new date and the reason for reasons for that action and shall offer the prisoner an opportunity for review of that action.

(4) Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for that action, and shall schedule the prisoner's next hearing within 12 months and in accordance with paragraph (2).

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15 C.C.R.

§ 2403. Base Term.

(a) General. The panel shall set a base term for each life prisoner who is found suitable for parole. The base term shall be established solely on the gravity of the base crime, taking into account all of the circumstances of that crime. If the prisoner has been received in prison for more than one murder committed on or after November 8, 1978 the base crime is the most serious of the murders considering the facts and circumstances of the crime. If the prisoner has been sentenced to prison for murders committed before November 8, 1978 and for murders committed on or after November 8, 1978 the base offense shall be the most serious of the murders committed on or after November 8, 1978.

The base term shall be established by utilizing the appropriate matrix of base terms provided in this section. The panel shall determine the category most closely related to the circumstances of the crime. The panel shall impose the middle base term reflected in the matrix unless the panel finds circumstances in aggravation or mitigation.

Provided, however in cases of attempted murder, after determining the category as specified, the panel shall impose one-half the middle base term, unless the panel finds circumstances in aggravation or mitigation.

If the panel finds circumstances in aggravation or in mitigation as provided in Sections 2404 or 2405, the panel may impose the upper or lower base term provided in the matrix by stating the specific reasons for imposing such a term. A base term other than the upper, middle or lower

base term provided in the matrix may be imposed by the panel it justified by the particular facts of the individual case and if the facts supporting the term imposed are stated.

(b) Matrix of Base Terms for First Degree on or after November 8, 1978.

	CIRCUMSTANCES			
FIRST DEGREE MURDER Penal Code § 189 (in years and does not include post conviction credit as provided in § 2290)	*A. Indirect* Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack; a crime partner actually did the killing.	*B. Direct or Victim Contribution* Death was almost immediate or resulted at least partially from contributing factors from the victim, e.g., victim initiated struggle or had goaded the prisoner. This does not include victims acting in defense of self or property.	*C. Severe Trauma* Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce terror in the victim.	*D. Torture* Victim was subjected to the prolonged infliction of physical pain through the use of nondeadly force prior to act resulting in death.
VICTIM *I. Participating Victim* Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred, e.g., crime partner, drug dealer, etc.	25-26-27	26-27-28	27-28-29	28-29-30
II. Prior Relationship Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. If victim had a personal relationship but prisoner hired and/or paid a person to commit the offense, see Category IV.	26-27-28	27-28-29	28-29-30	29-30-31

III. No Prior Relationship Victim had little or no personal relationship with prisoner, or motivation for act resulting in death was related in the accomplishment of another crime, e.g., death of victim during robbery, rape, or other felony.	27-28-29	28-29-30	29-30-31	8 30-31-32
IV. Threat to Public Order or Murder for Hire The act resulting in the victim's death constituted a threat to the public order include [sic] the murder of a police officer, prison guard, public official, fellow patient or prisoner, any killing within an institution, or any killing where the prisoner hired and/or paid another person to commit the offense.	28-29-30	29-30-31	30-31-32	31-32-33

SUGGESTED BASE TERM

(c) Matrix of Base Terms for Second Degree Murder on or after November 8, 1978.

CIRCUMSTANCES

SECOND DEGREE MURDER	*A. Indirect*	*B. Direct or Victim Contribtuion*	*C. Severe Trauma*
Penal Code § 189 (in years and does not include post conviction credit as provided in § 2290)	Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing.	Death was almost immediate or resulted at least partially from contributing factors from the victim, e.g., victim initiated struggle or had goaded the prisoner. This does not include victims acting in defense of self or property.	Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing strangulation, suffocation, burning, multiple wounds inflicted with a weapon not resulting in immediate death or actions calculated to induce terror in the victim.

VICTIM *I. Participating Victim* Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred, e.g., crime partner, drug dealer, etc.	15-16-17	16-17-18	17-18-19
II. Prior Relationship Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. If victim had a personal relationship but prisoner hired and/or paid a person to commit the offense, see Category IV.	16-17-18	17-18-19	18-19-20
III. No Prior Relationship Victim had little or no personal relationship with prisoner; or motivation for act resulting in death was related to the accomplishment of another crime; e.g., death of victim during robbery, rape, or other felony.	17-18-19	18-19-20	19-20-21
	SUGGESTED BASE TERM		

§ 2404. Circumstances in Aggravation of the Base Term.

(a) General. The panel may impose the upper base term or another term longer than the middle base term upon a finding of aggravating circumstances. Circumstances in aggravation of the base term included:

(1) The crime involved some factors described in the appropriate matrix in a category higher on either axis than the categories chosen as most closely related to the crime;

(2) The victim was particularly vulnerable;

(3) The prisoner had a special relationship of confidence and trust-with the victim, such as that of employee-employer,

(4) The murder was committed to preclude testimony of potential or actual witnesses during a trial or criminal investigation;

(5) The victim was intentionally killed because of his race, color, religion, nationality or country or origin;

(6) During the commission of the crime the prisoner had a clear opportunity to cease but instead continued;

(7) The manner in which the crime was committed created a potential for serious injury to persons other than the victim of the crime;

(8) The murder was wanton and apparently senseless in that it was committed after another crime occurred and served no purpose in completing that crime;

(9) The corpse was abused, mutilated or defiled;

(10) The prisoner went to great lengths to hide the body or to avoid detection;

(11) The murder was committed to prevent discovery of another crime;

(12) The murder was committed by a destructive device or explosives;

(13) There were multiple victims for which the term is not being enhanced under Section 2407;

(14) The prisoner intentionally killed the victim by the administration of poison;

(15) The prisoner intentionally killed the victim by lying in wait;

(16) The prisoner occupied a position of leadership or dominance over other participants in the commission of the crime, or the prisoner induced others to participate in the commission of the crime;

(17) The prisoner has a history of criminal behavior for which the term is not being enhanced under Section 2407;

(18) The prisoner has engaged in other reliably documented criminal conduct which was an integral part of the crime for which the prisoner is currently committed to prison;

(19) The prisoner was on probation or parole or was in custody or had escaped from custody at the time the crime was committed;

(20) Any other circumstances in aggravation including those listed in the Sentencing Rules for the Superior Courts.

No. 93-1462

In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSE RAMON MORALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws contained in Article I, section 9, clause 3 and Article I, section 10 of the U.S. Constitution?

LIST OF PARTIES

Petitioners are the California Department of Corrections, a state department which administers state prisons and other correctional programs; the Attorney General of the State of California, a California constitutional officer who is the chief law enforcement officer of the state; the California Board of Prison Terms, a state board which determines the terms, conditions, and dates of parole for adult state prisoners; and E.R. Meyers, the warden of the institution where respondent was incarcerated at the time respondent filed the underlying petition for a writ of habeas corpus.

Respondent is a state prisoner who was convicted of murder in 1971 and 1982.

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

OPINION BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported as *Morales v. Cal. Dept. of Corrections*, 16 F.3d 1001 (9th Cir. 1994) and is reprinted in Appendix A of the Petition for Certiorari.

JURISDICTION

The jurisdiction of this court to review the judgment of the Ninth Circuit by means of certiorari arises under 28 U.S.C. § 1254(1) and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Clause three, section nine, Article I of the U.S. Constitution states:

> No bill of attainder or ex post facto law shall be passed.

Clause one, section ten, Article I of the U.S. Constitution states:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

STATE STATUTE INVOLVED

The statute involved is subdivision (b) of California Penal Code § 3041.5, a provision enacted in 1977. The 1977 version of section 3041.5(b)(2) (Jt. App. at 3) stated:

> Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated. The board shall hear each case annually thereafter.

This version was effective until 1982. Jt. App. at 6. As amended, subdivision (b)(2) read as follows:

> Within 20 days following any meeting where a parole date has not been set . . . , the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date; and suggest activities in which he might participate that will benefit him while he is incarcerated.
>
> The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

In 1990, the provision was amended (Jt. App. at 9) to read:

> The Board shall hear each case annually thereafter, except the board may schedule the next hearing no later than the following:
>
> . . . (B) Three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking

> of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

In addition to the above, the principal effect of the 1990 amendment was to add a five-year deferral for those who had been convicted of more than two murders.[1] Jt. App. at 14.

On January 1, 1995, section 3041.5(b)(2)(B) will read as follows (Jt. App. at 17):

> Up to five years after any hearing at which parole has been denied if the prisoner has been convicted of murder, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding in writing. If

[1] The uncodified second section of the bill contained the following provision which limited the application of the five-year provision (Jt. App. at 14):

> The amendments to Section 3041.5 of the Penal Code made by this act shall be applicable only to offenses committed before July 1, 1977, or on or after January 1, 1991.

It appears that the only change to the three-year provision made by the bill was the capitalization of the initial "t" of the paragraph. *See* Jt. App. at 9. Therefore, it is unlikely that the uncoded second section of the bill was meant to apply to any "amendments" other than the new five-year provision. The bill summary, immediately after a discussion of the new five-year provision (Jt. App. at 11), states that the "bill would also make *this* provision applicable only to offenses committed before July 1, 1977, or on or after January 1, 1991 [emphasis added]." Jt. App. at 12. The intent of the drafters was obviously to limit retroactive application of the new five-year provision alone.

> the board defers a hearing five years, the prisoner's central file shall be reviewed by a deputy commissioner within three years at which time the deputy commissioner may direct that a hearing be held within one year. The prisoner shall be notified in writing of the deputy commissioner's decision. The board shall adopt procedures that relate to the criteria for setting the hearing between two and five years.

This amendment eliminates the three-year provision and authorizes a delay of up to five years between suitability hearings. There is no uncoded provision in the bill.

STATEMENT OF THE CASE

a. Factual background.

A bare recitation of the relevant facts is made in the first section of the Ninth Circuit opinion. In 1971, respondent was convicted of first degree murder. After being transferred to a half-way house in April 1980, he married. He was paroled in May 1980 and his wife disappeared two months later and her hand was found on a freeway. Her body was never recovered. Appendix A, Cert. Pet. at 1571; *Morales, supra* at 1002.

The 1982 probation report (Exhibit to Rtn., Supp. App. B, Cert. Pet. at 63-65) states:

> The victim in the [murder was] a 75-year-old- . . . . whom [respondent] met when she visited prison inmates. She had visited [respondent] frequently in prison . . . and . . . tried to convert him to her religion, Christian Science. After [respondent] was transferred to Los Angeles to

> a [prison] half-way house on April 14, 1980 in anticipation of his upcoming parole, she visited him in Los Angeles for one day on April 30, 1980 and secret[ ]ly married him. On July 4, 1980 she left her mobile home . . . and told friends that she was moving to Los Angeles to live with her husband. Later that day she bought gas in Los Angeles and was never seen alive again. . . .
>
> After the hand was found it was learned that [respondent] had obtained possession of the deceased's vehicle and had used her credit cards, forging her name. . . . At the time of the arrest [respondent] was in possession of the deceased's car, her purse, credit cards, and her diamond rings. [Her] body has never been found.

Id. at 65. The victim's son stated that a diamond ring found in respondent's possession belonged to his mother. *Id.* at 64.

Respondent pleaded no contest to second degree murder of his wife. The probation officer concluded:

> . . . [T]o regard [respondent] as anything less than a deliberate, calculating, cold-blooded murderer would be untenable. . . . [T]here can be no uncertainty regarding the cruelty he exhibited in both of the murders of which he has been convicted and in both of which he denies guilt. . . .
>
> The danger [respondent] presents cannot be overemphasized and in the best interests of society, it is hoped that he will remain in prison for the rest of his life. If and when parole is ever considered it is hoped that those persons responsible for making this decision will remain

> cognizant of [respondent's] proven violence and resist whatever manipulative techniques he may devise in the future.

Id. at 70-72.

Respondent's initial parole consideration was held on July 15, 1989. The California Board of Prison Terms found respondent unsuitable for parole and set a hearing three years in the future. The relevant portion of the August 22, 1989 parole suitability report (Exhibit to Rtn., Supp. App. B, Cert. Pet. at 45-46) states:

> 1. Commitment offense. The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense and the motive of the crime is very trivial in relation to the offense. . . .
>
> 2. Previous record. The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. He has an unstable social history, he has failed previous grants of parole and he cannot be counted upon to avoid criminality. He has failed to profit from society's previous attempts to correct his criminality which include being on parole and then committing another offense.
>
> The prisoner has an unstable social history and prior criminality which includes being found guilty of first degree[ ] murder, later being granted parole and then committing a second murder. Both being female victims intimately associated with the prisoner.

3. Institutional behavior. The prisoner has programmed in a limited manner while incarcerated and he has not participated in beneficial self-help or therapy programs.

4. Psychiatric factors. . . . The reports state[ ] as fol[l]ows:

> "A characteristic of an individual with this diagnosis is to avoid conflict whenever possible, but when 'against the wall' to quickly revert to primitive, often violent, behavior, sometimes with little or no recollection of the violent event."

"If parole is to be considered it is felt that his violence potential is greater than the average inmate because of his two murders." [Emphasis added.]

The panel finds the prisoner needs therapy in order to face, discuss, understand and cope with his past criminal behavior and reasons for the life crime. Until progress is made, he continues to be unpredictable and a threat to others.

The prisoner needs therapy in a controlled setting, but his motivation and amenability are questionable. . . .

Based on the information contained in the record and considered at the hearing, the panel concludes and states, as is required by PC sections 3043 and 3043.5, that the prisoner would pose a threat to public safety if released on parole.

Therefore, the prisoner is found unsuitable for parole.

The particular reasons for not having a parole suitability hearing in the next year were then set forth (*id.* at 47):

> In addition to the foregoing reasons supporting postponement of parole consideration, the panel also specifically finds that it is not reasonable to expect that parole would be granted at a hearing scheduled earlier based on the following facts:
>
> 1. The prisoner committed the offense in an especially heinous, atrocious and cruel manner wherein he mutilated the vi[c]tim's body after causing said death and, as such, requires a longer period of observation and/or evaluation before the Board can project a parole date.
>
> 2. The prisoner has a prior record of violent behavior, to wit, he was convicted of first degree murder in 1970.
>
> 3. In view of the prisoner's long history of criminality and misconduct, which includes the aforementioned murder, a longer period of time is required to evaluate his suitability.
>
> 4. The recent Psychiatric Evaluations . . . indicated a need for a longer period of observation and evaluation or treatment. The next hearing will be scheduled in three years.

b. Procedural background.

Respondent filed his petition for habeas corpus in the district court for the Central District of California on December 26, 1991. He alleged in pertinent part that he was the victim of an ex post facto change in the frequency of the parole consideration hearings. Appendix A, Cert.

Pet. at 1571-2; *Morales, supra* at 1002-1003. On December 27, 1991, the district court issued an order to show cause re the petition.

The return was filed on February 24, 1992. On May 18, 1992, the magistrate judge issued a report which recommended the denial of all issues save the parole issue presented in this Petition. Supp. App. C, Cert. Pet.

On August 20, 1992, the district court issued an order and judgment rejecting the ex post facto claim and dismissing the entire petition. Supp. App. D, Cert. Pet. A certificate of probable cause issued on September 24, 1992. Supp. App. D, Cert. Pet. The February 9, 1994 opinion of the Ninth Circuit is set forth in Appendix A, Cert. Pet.

The petition for certiorari was filed on March 7, 1994. The petition was granted on September 26, 1994.

SUMMARY OF THE ARGUMENT

The Ninth Circuit opinion below holds that despite the fact that parole suitability hearings are convened solely to gauge the *fitness* of an inmate to have a parole hearing which in turn *might* result in the setting of a parole date for certain felons with indeterminate sentences, a retrospective reduction in the frequency of parole eligibility hearings violates the prohibition against ex post facto laws. The circumstances of this case indicate that the Ninth Circuit has not engaged in the basic analysis set forth by this Court in *Weaver v. Graham*, 450 U.S. 24, 32 (1981) and has relied on a series of suppositions

about potential detriment to respondent which are totally without rational basis. In view of the national trend[2] towards the implementation of harsher penalties and conditions of confinement for offenders and inmates, it is necessary for this Court to reexamine the black-letter test set forth in *Weaver* and restate the nature and quality and burden of proof required to make a showing of detrimental impact as to an ex post facto claim.

ARGUMENT

AMENDMENT OF A LAW GOVERNING THE FREQUENCY OF PAROLE ELIGIBILITY HEARINGS TO PERMIT POSTPONEMENT OF ANNUAL HEARINGS WITHIN THE DISCRETION OF THE BOARD IS NOT AN EX POST FACTO LAW

In the instant case, the Ninth Circuit held that the 1981 amendment of section 3041.5(b)(2) was an ex post facto law as to respondent. In doing so, the Ninth Circuit found that the 1981 amendment "denied Morales opportunities for parole that existed under prior law, thereby making [his] punishment . . . greater than it was under the law in effect at the time his crime was committed." Appendix A, Cert. Pet. at 1574; *Morales, supra* at 1004. Whether those "opportunities" were substantial and detrimental under the second prong of *Weaver v. Graham*, 450 U.S. 24, 32 (1981) is the central issue of this case.

---

[2] Recent volumes of the Federal Reporter overflow with new ex post facto cases. *E.g. U.S. v. Couch*, 28 F.3d 711 (7th Cir. 1994); *U.S. v. Moore*, 27 F.3d 969 (4th Cir. 1994).

The Ninth Circuit found that the 1981 amendment was detrimental to respondent because it assumed that the greater the number of parole hearings, the greater the probability of parole:

> Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause.

Id. The syllogism is flawed and the Ninth Circuit opinion falls with the syllogism. *Weaver* requires proof by the inmate that he has been disadvantaged (*Weaver v. Graham, supra* at 29), not speculation and supposition of harm.

a. The 1977 enactment of the California Determinate Sentencing Law.

Prior to July 1, 1977, California law did not require annual parole suitability hearings. *In re Jackson*, 703 P.2d 100, 101 (Cal. 1985). On July 1, 1977, the determinate sentencing law (DSL)[3] went into effect and set the stage for the instant case. See generally *Way v. Superior Court*, 141 Cal.Rptr. 383, 386-387 (Cal.Ct.App. 1977); *People v. Community Release Board*,[4] 158 Cal.Rptr. 238, 240 (Cal.Ct.App. 1979).

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[3] The main feature of the law, determinate sentencing from a range of three sentence terms for crimes committed in the future, does not affect this case. California Penal Code § 1170.

[4] The Community Release Board was the predecessor to the current Board of Prison Terms. The Board determines parole suitability for California state prison inmates and is authorized by California Penal Code § 5075 *et seq.*

Those who had received a life sentence prior to 1977 were dealt with under California Penal Code § 1170.2(e). That section states:

> In the case of any prisoner who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1168 [indeterminate life sentencing] if the felony was committed on or after July 1, 1977, the Board of Prison Terms shall provide for release from prison as provided by this code.

The Board's duties and the procedural steps with regard to parole are set forth in pertinent part in California Penal Code § 3041.5. The instant case centers on subdivision (b) of that section, relating to the frequency of parole eligibility hearings, as it was enacted in 1977 and as it was subsequently amended for multiple murderers in 1981.

b. The 1981 amendment to California Penal Code § 3041.5(b).

Between 1977 and 1981, annual parole eligibility hearings were required by section 3041.5(b)(2). In pertinent part, that provision then read: "The board shall hear each case annually thereafter." In 1981, subdivision (b) of that section was amended to permit hearings every second or third year for multiple murderers within the Board's discretion, if the requisite findings were made.

> The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than three years after any hearing at which parole is denied if the prisoner has been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.

These amendments concern those who stand convicted of more than one offense which involve the taking of a life. The net effect was to delete annual parole eligibility hearings, *not parole itself*, and substitute a hearing within three years for those whom the Board found did not possess a reasonable expectation of parole in the intervening years. *The statute plainly states that annual suitability hearings would be held and that extension of the hearings would occur if and only if the proper discretionary findings could be made by the Board.*

c. Caselaw exploring the ex post facto ramifications of subsequent amendments to section 3041.5.

1. Interpretation of the 1982 amendment to section 3041.5 as a prologue to judicial interpretation of the 1981 amendment.

The first major case exploring the ex post facto ramifications of the enactment of the determinate sentencing law involved a 1982 amendment not affecting respondent in the instant case. *In re Jackson, supra.* In 1982, section 3041.5(a) was amended to permit hearings every two

years for all inmates sentenced under the determinate sentencing law with no parole dates. The procedure for all eligible inmates in 1982 and after was as follows:

> The parole considerations procedures are governed by section 3040 et seq. and apply to all inmates not serving a determinate sentence [i.e. without a determinate term pronounced by the sentencing court]. (Section 1170 et seq.; see sections 3041, 3000.) Once such an inmate has served sufficient time to be eligible or soon eligible for parole, he or she receives notice that a parole suitability hearing before a Board hearing panel will be held. (Sections 3041, 3041.5, 3042.) [Various procedural rights, including the right to counsel, apply.] (Sections 3041.5, 3041.7, 3042; Cal.Admin.Code, tit. 15, sections 2245-2256.)

In re Jackson, supra at 102. Following the hearing, the Board must set a date for release on parole unless it makes certain findings and if it does make detrimental findings, another hearing is set for the next year unless the Board makes other detrimental findings. California Penal Code § 3041.5(a). In that instance, the next hearing will be in two years.

Jackson involved a claim by an inmate who was convicted in 1961. At that time, there was no provision for annual hearings. He appeared at an initial 1983 hearing and was found unsuitable for parole. His next hearing was scheduled for two years hence under the 1982 amendment. Jackson, on state habeas corpus, claimed that he was entitled to annual review under the 1977 procedures. The California Supreme Court found that the change from one-year to two-year hearings was not an ex post facto law:

> Although the issue is close, this court holds that the 1982 amendment is a procedural change outside the purview of the ex post facto clause. The amendment did not alter the criteria by which parole suitability is determined. . . . Nor did it change the criteria governing an inmate's release on parole. . . . Most important, the amendment did not entirely deprive an inmate of the right to a parole suitability hearing. . . . *Instead, the 1982 amendment changed only the frequency with which the Board must give an inmate the opportunity to demonstrate parole suitability . . . This change did eliminate the possibility that a parole date would be set within the period of postponement. However, the likelihood that the postponement actually delays release on parole until after the next hearing appears slight.* [Emphasis added.]

In re Jackson, supra at 105. The California Supreme Court noted that the presence of counsel and the numerous procedural safeguards at the parole hearing provided "insurance that any postponement decision [would] be well-founded." *Id.* at 106.

Crucial to the *Jackson* decision are legislative findings which show that the effect of delaying the hearings was slight.

> The two legislative committee analyses which were prepared while the 1982 amendment was pending in the Legislature provide some insight on this point. At the initial parole suitability hearing, which occurs one year before an inmate's minimum eligible parole date (section 3041), 90 percent of inmates are found unsuitable for parole release. At the second and subsequent parole suitability hearings, approximately 85 percent are found unsuitable. . . . In view of these statistics, the 1982 amendment was seen as a means "to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no chance of being released."

Id. at 106. Moreover, the *Jackson* case involved a finding of unsuitability for parole. The record contained no evidence "as to how often, if ever, a determination of parole *suitability* results in an inmate's *release* on parole soon after a suitability determination. [Emphasis in original.]"

> Such evidence would obviously be relevant to whether inmates are actually disadvantaged – in terms of serving longer prison terms – as a result of a hearing postponement.

Id. Unlike the changed computation of eligibility in *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1100, only the *frequency* of parole suitability hearings was affected by the 1982 amendment. *In re Jackson, supra* at 108. Unlike the "gain-time" credits in *Weaver v. Graham*, 450 U.S. 24 (1981), there was no certain release date to be affected by the amended law in question. *In re Jackson, supra* at 107. In sum, there was no certain release date to be affected by the amendment and no evidence of any untoward effect on any possible release date.

2. Judicial construction of the 1981 amendment.

The instant case is an attempt to address a problem similar to that explored in *Jackson*, the ex post facto ramifications of the 1982 amendment. Here an inmate

who was clearly entitled to annual hearings at the time of his offense, the offense having occurred after 1977, but who committed the offense prior to the 1981 amendment regarding multiple taking of lives, claims that the 1981 amendment materially increases his punishment and is therefore an ex post facto law. In this situation, *Weaver* commands an inquiry into whether a retrospective state statute ameliorates or worsens conditions imposed by its predecessor. *Weaver v. Graham, supra* at 33. Notwithstanding the plain requirement of detriment set forth in *Weaver, Morales* states that because an eligibility hearing is a precedent to parole, fewer hearings mean a smaller chance of obtaining parole.

> Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. . . . *Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause.* [Emphasis added.]

Appendix A, Cert. Pet. at 1574; *Morales, supra* at 1004. Such an assumption does violence to the structure of state law and to the nature and burden of proof in ex post facto litigation. *Morris v. Castro*, 212 Cal.Rptr. 299, 302 (Cal.Ct.App. 1985).

The Ninth Circuit error in this case tracks *Roller v. Cavanaugh*, 984 F.2d 120, 123 (4th Cir. 1993), *cert. granted* 113 U.S. 2412 *cert. dm.* 114 S.Ct. 593. *Roller* first declares that there is a conflict among the circuits as to the ex post facto effect of diminishing the number of parole eligibility hearings:

> Four of our sister courts of appeals have directly addressed whether a retroactive reduction in the frequency of parole consideration violates the *ex post facto* clause. Three have held that it does, though the Ninth Circuit's opinion was vacated on other grounds and is thus a nullity. *Rodriguez v. United States Parole Comm.*, 594 F.2d 170 (7th Cir. 1979) . . . ; . . . *Watson v. Estelle*, 859 F.2d 105 (9th Cir. 1988), *vacated* 886 F.2d 1093 (9th Cir. 1989);[5] *Akins v. Snow*, 922 F.2d 1558 (11th Cir. [1991]), *cert. den.* . . . 111 S.Ct. 2915 . . . ; *but see Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), *cert. den.* . . . 112 S.Ct. 1516.[6]

Examination of the cases cited in *Roller*, with the exception of *Bailey*, shows that each, as the Ninth Circuit did in the instant case, assumed without proof in the record that the chances of parole are increased if more hearings are held. Each proceeds to judgment without a positive showing of detriment to the inmate, thus failing to meet the second prong of *Weaver*. *Akins v. Snow, supra* at 1563. In each of these cases, and in the instant *Morales* opinion, the appellate courts rely on suppositions. For example, in *Rodriguez v. United States Parole Comm., supra* at 176, the word "might" is the operative word.

> Eligibility in the abstract is useless; only an unusual prisoner could be expected to think that

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[5] It is odd that the Fourth Circuit counted the Ninth Circuit in its camp on the basis of *Watson I*, 859 F.2d 105. As noted in the *Roller* opinion, *Watson II* vacated *Watson I* and reversed *Watson I*'s conclusions. 886 F.2d 1093-1094.

[6] Other listings of relevant cases are contained in *Akins v. Snow, supra* at 1564, ftn. 12 and *U.S. Parole Commission Guidelines for Federal Offenders*, 61 ALR Fed. 135, 155-159 (1983).

> he is not suffering a penalty when even though he is eligible for parole and *might be released* if granted a hearing, he is denied that hearing.

None of these decisions relies on actual proof of detriment. *Rodriguez* simply assumes that fewer hearings must be detrimental. *Akins* assumes that because an eligibility hearing is part of the process which leads to parole, fewer hearings are detrimental. *Roller* compounds the error by confusing detriment with the inmate's subjective negative reaction to being in prison.

None of these cases comes to grips with the issue of detriment in the manner that *Jackson* does. In *Weaver*, the reduction in "gain-time" accumulation *must inevitably* lengthen the term of imprisonment. No inevitable result flows from a decrease in the frequency of parole eligibility hearings and there is nothing in the record approximating the kind of proof of detriment which appears in *Weaver* or lack of proof of detriment in *Jackson*.[7]

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[7] The nature of proof of ex post facto violation has recently been explored by the Ninth Circuit. *Powell v. Ducharme*, 998 F.2d 710 (9th Cir. 1993) involved a claim that under a new parole law the inmate had to be considered for parole at the end of 30 years. The inmate contended this meant that he could not be paroled before the end of this term. However, the Ninth Circuit found that the parole board could redetermine the inmate's discretionary minimum term at any time, including prior to the expiration of his discretionary minimum term.

> Whether the "likelihood" of an earlier parole hearing has been diminished is a question that cannot be answered. It is impossible to make a quantitative comparison between [the new law], requiring a parole hearing at a certain date, and [the former law], which left such a determination to the unfettered

The Ninth Circuit has erred in ordering two more hearings every three years than required by the California Legislature on the basis of mere supposition. There is nothing in the record to indicate that an inmate who has committed the horrendous crimes contained in this record would be deprived of an earlier parole because his parole suitability hearings come every third year instead of annually. There is no inherent relation between the number of hearings and parole because frequency of appearance does not imply improvement of character. It is the nature of the individual which counts and the findings required by statute for extension of the hearings reflect the exercise of the inherent discretion of the Board to make evaluations and predictions of suitability for parole. Jt. App. at 17, 19-20. Indeed, if the Board in its discretion finds that "it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding" (Jt. App. at 9), *that finding directly and positively negates any inference of prejudice to the inmate which might otherwise be made on a silent record*. It is inconceivable that any reasonable person could find that respondent would be ready for parole in the year immediately following the completion of his

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> discretion of both the superintendent of the institution and the Board. . . . Such predictions of how the superintendent or the Board would have exercised their discretion have no basis in law.

Id. at 715. Put another way, speculation cannot be used to determine whether a new law prejudices an inmate.

minimum term of imprisonment given the record in this case.[8]

A review of the Board's findings indicates there was more than ample reason to postpone the next annual hearing. These findings show that annual hearings would be an exercise in futility for all. The Board findings, in light of the facts before it as to respondent's crimes and personality, are unimpeachable. *Therefore, respondent was not detrimentally affected by postponement because he had no "reasonable" expectation that the next annual hearings, were they to be held, would result in the granting of parole.*

It is clear that the timing of the hearings does not alter the fundamental discretion of the Board to grant parole, especially in light of the determination made by the Board when the decision to utilize section 3051.5(b)(2) was made. Where the alteration in parole procedures does not vitiate "individualized consideration" from the parole board, there is no ex post facto issue. *Eason v.*

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[8] If respondent had been found *suitable* for parole, his base term would have been set by reference to a matrix of facts concerning the crime and the victim. Jt. App. at 19-21. Even judged in the best possible light, respondent's basic sentence would be 19 years or more, given the abundance of circumstances in aggravation of the base term, e.g. that the victim was aged and therefore particularly vulnerable; the victim was respondent's wife and therefore respondent had a special relationship of confidence and trust with the victim; the corpse was abused, mutilated, or defiled; respondent went to great lengths to hide the body; and respondent was on parole at the time the crime was committed. Jt. App. at 24-25. Therefore, without engaging in undue speculation, it appears that respondent, even if he had been granted parole, would not have been released until 19 years after his 1982 sentencing.

Dunbar, 367 F.2d 381, 382 (9th Cir. 1966), *cert. den.* 386 U.S. 947; *Zeidman v. U.S. Parole Comm.*, 593 F.2d 806, 808 (7th Cir. 1979); see *Rifai v. U.S. Parole Comm.*, 586 F.2d 695 (9th Cir. 1978); *Ewell v. Murray*, 11 F.3d 182, 484 (4th Cir. 1993). Where, as here, an inmate sentenced to an indeterminate term has no legitimate entitlement to parole on a date certain, the denial of parole itself, let alone the denial of a parole suitability hearing, cannot constitute an ex post facto application of law. *See Malek v. Haun*, 26 F.3d 1013, 1016 (10th Cir. 1994).

Where a parole rule is not so overly intrusive that it substantively affects the review standard, it is deemed procedural[9] and there is no ex post facto violation. *Griffin v. State*, 433 S.E.2d 862, 864 (S.C. 1993), overruling *Gunter v. State*, 378 S.E.2d 443 (S.C. 1989); see *Freeman v. Comm. of Pardons & Paroles*, 809 P.2d 1171, 1176 (Ida. 1991). Given the discretion exercised by the Board which is embodied in the statutory-required findings, the change from annual hearings is merely procedural. *But see Flemming v. Oregon Board of Parole*, 998 F.2d 721 (9th Cir. 1993).

Recent Ninth Circuit rulings, including *Powell*, *Flemming* and *Morales*, indicate that there is substantial ambiguity about what comprises substantial harm for the purposes of determining an ex post facto issue. In particular, the Ninth Circuit seems to be grasping at some yet-

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[9] *Morales* directly contradicts *Jackson* as to whether the procedural classification is of any legal moment. *Morales*, *supra* at ftn. 5.

unarticulated test for prejudice and simultaneously rejecting the utilization of discretion as a factor of consequence.[10]

However, it is doing so in direct contradiction of the holdings of the California Supreme Court and at least one of the federal courts of appeal. Moreover it does so in

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[10] The number of recent Ninth Circuit published cases on ex post facto laws is extraordinary. *E.g. U.S. v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994); *U.S. v. Walker*, 27 F.3d 417 (9th Cir. 1994). Three of these cases present situations similar to the instant case.

Flemming v. Oregon Bd. of Parole, 998 F.2d 721, 724-727 (9th Cir. 1993) holds that a lessening of the amount of possible reduction in sentence from 20% of the term to a maximum of seven months was a violation of the ex post facto clause. In other words, a palpable reduction in time was created by the change in the cap on sentences. This case is obviously of little relevance to the instant case because it deals directly with time actually served in the same manner as the issue of credits for time served. *See Weaver v. Graham, supra.*

Nulph v. Faatz, 27 F.3d 451, 454 (9th Cir. 1993) is similar to *Flemming* in that *Nulph* involved a palpable change in the method of calculating parole dates. A law enacted after the inmate's crime eliminated a more favorable method for determining the matrix range for offenders sentenced to consecutive terms. Therefore the inmate could point to a definite change in his sentence. *See also U.S. v. Johns*, 5 F.3d 1267, 1269 (9th Cir. 1993).

Powell v. Ducharme, 998 F.2d 710, 715 (9th Cir. 1993), was issued by the Ninth Circuit three days before *Flemming*. *Powell* states that there was no violation of the ex post facto clause because the inmate was still subject to the discretion of the parole board as to when he received a parole hearing. *Powell* therefore presents an instance where the Ninth Circuit found no showing of detriment in the change in parole structure. *See* ftn. 8, *supra*.

apparent ignorance of the ameliorative and responsible requirement of findings for postponement directed by the California Legislature. This Court must indicate, once and for all, what harm is and how it may be measured for ex post facto purposes.

CONCLUSION

The Ninth Circuit erred in this case because it substituted a supposition of harm for the showing of substantial detriment required by *Weaver*. The Board has been given discretion to determine parole suitability upon certain statutory criteria and to defer future hearings upon certain statutory criteria. The Ninth Circuit has upset the structure of paroles within the state by micromanaging the timing of hearings without any showing of possible detriment to the inmate amounting to *Weaver* second prong harm. *In doing so, the Ninth Circuit has chosen to ignore the fact that the statutory findings mandated by state law clearly establish that there is no prejudice to the inmate from the postponement.*

The Ninth Circuit must not be permitted to find detriment without an affirmative showing of prejudice to respondent. The "logic" utilized by the Ninth Circuit in the instant opinion is no more than wishful thinking and makes a mockery of the *Weaver* analysis.

Respectfully submitted,

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DATED: October 28, 1994

QUESTION PRESENTED

Does a State violate the Ex Post Facto Clause by retroactively eliminating statutorily-mandated opportunities for consideration of a prisoner's release on parole?

TABLE QF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

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OTHER AUTHORITIES

STATEMENT OF THE CASE

In 1982, a California court sentenced respondent Jose Ramon Morales ("Morales") to a term of 15 years to life in prison. Morales received this sentence after pleading "no contest" to second-degree murder for an offense committed in 1980. The California Penal Code provides that offenders in Morales' position are eligible for parole release after serving ten years of confinement, *see* Cal. Penal Code §§ 190 (West 1988), 2931(a) (West 1982), a period that Morales completed in 1990. By statute, responsibility for determining the timing of parole release, and for fixing the actual length of confinement for parole-eligible offenders such as Morales, rests with the California Board of Prison Terms. *See generally id.* §§ 3000-02, 3040-65 (West 1982 & Supp. 1994).

The Penal Code requires the Board of Prison Terms to conduct an initial parole hearing one year before the prisoner's "minimum eligible parole release date." Cal. Penal Code § 3041(a) (West 1982). The state statute requires the Board to find the offender "suitable" for parole at this hearing, and to set a release date, unless the Board determines that "consideration of the public safety require[s] a more lengthy period of incarceration." *Id.* § 3041(b) (West 1982).[1] At the time Morales committed his offense, the

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[1] California law accords prisoners extensive procedural rights at parole suitability hearings. The prisoner must be permitted to examine his parole suitability file in advance, Cal. Penal Code § 3041.5(a)(1) (West 1982 & Supp. 1994); must "be permitted to be present, to ask and answer questions, and to speak on his or her own behalf," *id.* § 3041.5(a)(2); and must "be permitted to request and receive a stenographic record of all proceedings," *id.* § 3041.5(a)(4). In addition,

Penal Code required the Board, in the event that it declined to set a release date at this initial hearing, to permit the prisoner to appear at a hearing each year thereafter and urge his or her suitability for parole, until a parole release date was fixed. *Id.* § 3041.5(b)(2) (*see* Joint Appendix ("J.A.") 3).

In 1981, after Morales committed his offense, the California Legislature retroactively changed this statutory mandate to permit the Board to deny annual parole suitability hearings to prisoners convicted of more than one offense involving the taking of human life. Under this authority, the Board can direct such prisoners to serve as much as three years of confinement before any further reconsideration of their release, provided that the Board finds that it is "not reasonable" to expect parole to be granted in the intervening period. 1981 Cal. Stat. ch. 1111 § 4, *codified at* Cal. Penal Code § 3041.5(b)(2) (West 1982). Because the Penal Code requires the Board to hold a parole consideration hearing before it sets a prisoner's parole release date, the amendment deprives the prisoners to whom it applies of any possibility of release during this period of delay. *See generally id.* §§ 3041-41.4 (West 1982 & Supp. 1994).

The California Legislature's actions are consistent with what appears to be a nationwide trend to defer parole

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a prisoner serving a life sentence is entitled to be represented by counsel. *Id.* § 3041.7.

hearings,[2] and to ensure that greater portions of sentences are served behind bars.[3] In fact, the 1981 retroactive amendment was the first of four successive measures by the California Legislature that delay the hearings at which prisoners' parole release dates are set. Each legislative action either further lengthened the time between parole hearings,

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[2] *See, e.g.*, N.H. Rev. Stat. Ann. § 651:20(I)(a) (Supp. 1993) (reducing frequency with which violent offenders can petition for suspended sentences from two to four years); Mich. Comp. Laws Ann. § 791.234 (West 1992) (reducing frequency of parole interviews, and delaying initial interview, for prisoners serving parolable life sentences); Ill. Rev. Stat. ch. 38, ¶ 1003-3-5(f) (Supp. 1988) (reducing hearing frequency from every year to every three years where it is deemed not reasonable to expect that parole would be granted in intervening years); S.C. Code Ann. § 24-21-645 (Supp. 1987) (reducing hearing frequency from annually to biannually); Ariz. Rev. Stat. Ann. § 31-411(B) (1978); Ariz. Comp. Admin. R. & Regs., Rule R5-4-602 (1980) (increasing permissible interval between commutation hearings from one to two years); *see also Akins v. Snow*, 922 F.2d 1558, 1560 & n.5 (11th Cir.) (discussing 1986 amendment to Georgia parole board regulations changing parole hearing frequency from one to eight years), *cert. denied*, 501 U.S. 1260 (1991).

[3] Petitioners make no attempt to conceal the punitive motivations behind this trend. Indeed, in their "Summary Of The Argument," they expressly urge the Court to "reexamine" the Court's ex post facto cases "[i]n view of the national trend towards the implementation of harsher penalties and conditions of confinement for offenders and inmates." (Petitioners' Brief on the Merits ("Pet'rs Br.") at 11; *see also* Br. of *Amici* The States of Pennsylvania *et al.* at 12-13 & nn. 4-6 (listing statutes limiting the availability of parole and otherwise imposing harsher, more rigid sentences).)

expanded the class of prisoners subject to such delays, or both.[4]

In accordance with the Penal Code, the Board of Prison Terms held a hearing to determine Morales' initial suitability for parole on July 15, 1989. It found him unsuitable for release at that time. Applying the 1981 amendment to § 3041.5(b)(2), the Board also found that it was "not reasonable" to expect parole to be granted to Morales in the ensuing three years. (Ex. B, Supp. App. to Pet. for Cert. at 47.) In so doing, the Board eliminated Morales' eligibility for a parole reconsideration hearing for the maximum three-year period permitted.

Following the Board's three-year deferral, Morales sought a writ of habeas corpus in the United States District Court for the Central District of California. Morales argued, among other things, that the Board's refusal to consider him for parole release on an annual basis violated the Ex Post

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[4] In 1982, the California Legislature amended Penal Code § 3041.5(b)(2) to permit the Board of Prison Terms to defer consideration of any prisoner for two years, rather than one year, if the Board finds it "not reasonable" to expect a release date to be set in the intervening period. 1982 Cal. Stat. ch. 1435, § 1. In 1990, the Legislature extended the Board's authority to deny parole hearings for up to five years to offenders convicted of more than two offenses involving the taking of a life. 1990 Cal. Stat. ch. 1053, § 1. In 1994, the Legislature replaced the provisions added in 1981 and 1990 with a much broader provision allowing the Board to defer parole consideration for as many as five years for all offenders imprisoned for murder. 1994 Cal. Stat. ch. 560, § 1. Notably, while the California Legislature provided that the 1990 amendment would have prospective effect only, the five-year deferral authority added in 1994 was made applicable to previously committed offenses. *See* 1990 Cal. Stat. ch. 1053, § 2; 1994 Cal. Stat. ch. 560.

Facto Clause of Article I, Section 10, Clause One of the United States Constitution. A magistrate judge recommended that the writ be granted as to Morales' ex post facto claim. The District Court, however, declined to adopt the magistrate judge's recommendation and denied Morales' ex post facto claim, as well as the other claims in the petition.

The Ninth Circuit unanimously reversed. Recognizing that parole in California can occur only after a hearing before the Board of Prison Terms, the Court of Appeals reasoned that a law that suspends or eliminates parole hearings necessarily precludes "the possibility of parole altogether in the period between hearings." *Morales v. California Dep't of Corrections*, 16 F.3d 1001, 1004 (9th Cir. 1994). The Ninth Circuit rejected the State's assertion that the burden fell on Morales to show a substantive entitlement to -- or a likelihood of -- parole in the intervening years in which he was denied annual hearings. *Id.* at 1005. The court reasoned that imposition of such a burden on the offender would be inconsistent with both the historical premises of the Ex Post Facto Clause and longstanding decisions of the Supreme Court. Quoting this Court's decision in *Weaver v. Graham*, 450 U.S. 24, 30 (1981), the Ninth Circuit observed: "'Critical to relief under the ex post facto clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" 16 F.3d at 1005. The Court of Appeals therefore held that a State may not retroactively eliminate or postpone opportunities for parole consideration without violating the Ex Post Facto Clause. In so holding, the Ninth

Circuit joined every other federal appellate court that has considered the issue.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause enjoins a State from applying any "law that changes the punishment, and inflicts a greater punishment, than the law annexed to [a] crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Where the State prescribes a fixed quantum of punishment for an offense, that punishment may not retroactively be enhanced. Where the State prescribes a range of possible punishments for a criminal act, and leaves the selection of the actual punishment imposed in a given case to a sentencing judge or to corrections officials, the Ex Post Facto Clause prevents a State from retroactively imposing a more onerous "standard of punishment" for previously committed offenses. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). In reviewing ex post facto challenges, this Court has repeatedly rejected assertions by the State that a more onerous retroactive statute may be upheld because the offender might have received equivalent punishment under the predecessor standard. If a State changes the "standard of punishment" for a previously committed crime and thereby forecloses opportunities for reduced confinement available to the offender under prior law, it acts in violation of the Ex Post Facto Clause. *Id.* at 401-02.

Under California law, the State's Board of Prison Terms decides when a parole-eligible offender will be released and, by statute, can grant parole to an offender only following a parole consideration hearing. At the time of Morales' offense, if the Board denied release at a prisoner's

initial parole hearing, state law mandated that the Board reconsider the prisoner for release each year thereafter. Following the commission of Morales' crime, the California Legislature significantly lengthened the period between parole reconsideration hearings for offenders in Morales' position. Under this amendment, such offenders must serve as many as three years of confinement before obtaining a parole reconsideration hearing, rather than the one year period mandated by the prior statute. This change retroactively makes Morales' punishment more onerous in violation of the Ex Post Facto Clause by eliminating opportunities for parole release -- and thus for reduced confinement -- available under the superseded law.

Petitioners incorrectly claim that California's retroactive legislation survives ex post facto scrutiny because it contains "procedural safeguards" that purportedly ensure that parole consideration is not delayed for those with "reasonable" chances of gaining parole. Petitioners' assertion ignores this Court's cases holding that an offender need not have a "vested right" to reduced confinement under the superseded regime in order to challenge retroactive application of a more onerous standard of punishment. *See, e.g., Weaver*, 450 U.S. at 29. Moreover, petitioners' proposal that ex post facto protection against retroactive postponement of parole eligibility be afforded only to those offenders who can demonstrate a "reasonable" chance of early release would involve the federal courts in speculative inquiries into the probable determinations of administrative bodies in thousands of individual cases. At bottom, petitioners urge recognition of a *de minimis* exception to the Ex Post Facto Clause's proscription, but they proffer no support for such an

exception in the text of the Clause itself or in the Court's decisions interpreting it. The suggestion should be rejected.

ARGUMENT

Nearly two centuries ago, Justice Chase wrote in *Calder v. Bull*, 3 U.S. (3 Dall.) at 390, that the Ex Post Facto Clause prohibits "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." The Supreme Court has reaffirmed this pronouncement time and again. *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 43 (1990) ("Legislatures may not retroactively alter the definition of crimes *or increase the punishment for criminal acts*" (emphasis added)). Under settled principles, a law changing the punishment for existing crimes is within this prohibition if it makes more onerous the "standard of punishment" applicable to a previously committed crime. *E.g., Lindsey*, 301 U.S. at 401.

The California Legislature retroactively heightened the standard of punishment applicable to the crime for which Morales was convicted in 1982 by permitting the Board of Prison Terms to eliminate, for as many as three years, the parole reconsideration hearings that were formerly guaranteed to Morales on an annual basis. This conclusion follows inescapably from the function of parole release, and from an unbroken line of cases holding that the Ex Post Facto Clause enjoins retroactive application of enhanced punishment standards even to offenders who cannot demonstrate an entitlement to lesser punishment under prior law.

I. ELIGIBILITY FOR PAROLE IS AN INTEGRAL PART OF PUNISHMENT FOR EX POST FACTO PURPOSES.

The possibility of parole is integral to, and materially mitigates, a criminal defendant's sentence. This Court's decisions have recognized that a sentence of imprisonment that carries the possibility of parole release is less onerous than a sentence of equivalent length that does not. In light of the character of parole release and its function in determining the length of a prisoner's confinement, a State may not deprive a prisoner of preexisting eligibility for parole without enhancing punishment, and thus offending the Ex Post Facto Clause.

In California, as in many other states, parole consideration is an essential part of the statutory scheme by which periods of confinement are fixed. Rather than specify immutable prison terms, courts mete out sentences qualified by a statutory parole system defining the requirements for early release. Through good behavior in prison and through demonstration of the capacity for responsible behavior in the community, prisoners may exchange the harshness of physical confinement for the comparative leniency of parole. And where judges once attempted to determine the appropriate period of retribution, or predict the timing of an offender's rehabilitation, administrative bodies such as California's Board of Prison Terms now make these determinations long after an offender's sentencing. Parole is, as this Court has described it, "an established variation on imprisonment of convicted criminals." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

The mere possibility of parole release significantly mitigates criminal punishment. For instance, in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court relied on the bare possibility of parole to hold that a sentence of life imprisonment for three theft convictions, each involving less than $125.00 in property, did not violate the Cruel and Unusual Punishments Clause of the Eighth Amendment. *See id.* at 280-81. Although this Court in *Rummel* specifically recognized that the offender's likelihood of being released on parole was "slim," the mere fact that the offender's sentence technically included the possibility of parole rendered the life sentence sufficiently less onerous to pass muster under the Eighth Amendment. *Id.* at 281.

The Court emphatically reaffirmed this point three years later in *Solem v. Helm*, 463 U.S. 277 (1983), when it found a life sentence that did not carry the possibility of parole to be "significantly disproportionate" to the nonviolent felonies for which it was imposed, and therefore violative of the Eighth Amendment. *Id.* at 303. The Court rejected South Dakota's assertion that the possibility of executive commutation was sufficient to render the sentence comparable to the parole-eligible sentence sustained in *Rummel*, noting that the possibility of parole, unlike the possibility of commutation, is "the normal expectation in the vast majority of cases." *Id.* at 300-01. In language that is particularly relevant here, the Court found a prisoner's "expectation" of parole important for Eighth Amendment purposes because -- in contrast to commutation -- "[t]he law generally specifies when a prisoner *will be eligible to be considered for parole*, and details the standards and

procedures applicable at that time." *Id.* at 300 (emphasis added).[5]

Consistent with the view stated by this Court in *Rummel* and *Solem*, California law expressly recognizes that a sentence of life with a possibility of parole is less onerous than a life sentence that does not include parole consideration. For, absent a finding that statutorily enumerated aggravating circumstances outweigh potentially mitigating circumstances, California law precludes the imposition of a life sentence without the possibility of parole. *See* Cal. Penal Code §§ 190-190.4 (West 1988). And more than simply providing an opportunity for conditional release, parole in California offers the offender an opportunity to extinguish the underlying sentence -- even one of life imprisonment -- and gain a complete discharge from custody. Most offenders, once given conditional release, cannot be required to remain on parole more than three years before they must be discharged altogether. *Id.* § 3000(b) (West 1982 & Supp. 1994). At the time Morales was convicted, the California Penal Code accorded offenders convicted of second-degree murder similar treatment. Thus, even though

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[5] From its institutional beginnings, release on parole has been viewed as an intrinsically less onerous form of punishment than imprisonment. Captain Alexander Maconochie, who in 1840 implemented the first parole system, at Norfolk Island prison in Australia, regarded parole (which was termed a "ticket-of-leave") as a stage of punishment several degrees less burdensome than imprisonment. *See* IV ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 11 (reprint 1974) (1939). The pioneer of the parole system in Spain, Colonel Montesinos, similarly regarded parole as a way for society to "correct" offenders rather than merely "punish" them. *See id.* at 8-9.

he was sentenced to a term of 15 years to life imprisonment, Morales -- if granted release on parole -- cannot be required to serve more than five years in that status prior to being discharged. *Id.*

Not surprisingly, an offender's eligibility for parole release, and the timing of that eligibility, are important considerations in the criminal sentencing process. Judges inevitably account for parole eligibility when fixing the length of sentences within authorized statutory ranges. *See, e.g.*, *Kramer v. United States*, 409 F. Supp. 1402, 1404 (N.D. Ga. 1976).[6] The availability of parole also influences a defendant's willingness to enter a negotiated plea of guilty. As this Court recognized in *Weaver*, "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." 450 U.S. at 32. Indeed, in California, as in many jurisdictions, the timing of an offender's eligibility for parole has been held to be so central to the punishment imposed that the offender may withdraw a guilty plea if he has been misinformed on that

[6] From the earliest experimentation with parole regimes, the availability of parole and other applicable parole rules have been understood to have a significant effect on the length of the underlying sentences to which they attach. *See* IV ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 3-4 (citing Gault, *The Parole System, A Means of Protection*, 5 J. CRIM. L. 802 (1915); Butler, *The Indeterminate Sentence and Parole Law*, INDIANA BULL. CHARITIES & CORR. 8 (1916); and ALCO, INDETERMINATE SENTENCE AND PAROLE 3 (1926)).

subject. *See People v. Tabucchi*, 64 Cal. App. 3d 133, 134 Cal. Rptr. 245 (1976).[7]

It follows that a prisoner's statutory eligibility for parole may not retroactively be withdrawn consistent with the Ex Post Facto Clause. A statutory withdrawal of parole eligibility plainly alters the *authorized* punishment for an offense, even if the release decision is committed to the discretion of a paroling authority, and even though the ameliorative effect of parole on the actual period of confinement served by the offender cannot be determined with precision. As this Court has noted, "'[i]t may be 'legislative grace' for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offenses . . . this is in the nature of an additional penalty.'" *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) (quoting *Durant v. United States*, 410 F.2d 689, 691 (1st Cir. 1969)); *see also Weaver*, 450 U.S. at 30-31 ("even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [Ex Post Facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the

[7] *See also Durant v. United States*, 410 F.2d 689, 693 (1st Cir. 1969) ("the district court should not have accepted the guilty plea without first informing the defendant that conviction upon the plea would make him ineligible for parole"), *cited in Weaver*, 450 U.S. at 32; *Munich v. United States*, 337 F.2d 356, 361 (9th Cir. 1964); *People v. Victorian*, 2 Cal. App. 4th 954, 4 Cal. Rptr. 2d 460 (1992) (inaccurate advice concerning length of parole term entitles defendant to withdraw guilty plea).

offense").[8] The practical reality that parole eligibility typically presages reduced confinement, and not the due process-based notion that a prisoner is without an enforceable right to release, is crucial here. "[O]nly an unusual prisoner," the Court has explained, "could be expected to think that he was not suffering a penalty when he was denied eligibility for parole." *Marrero*, 417 U.S. at 662-63 (citing *United States v. Ross*, 464 F.2d 376, 379 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973) and *United States v. De Simone*, 468 F.2d 1196, 1199 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973)).[9]

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[8] *Marrero* addressed the question whether a provision of law prohibiting parole for certain drug offenders remained applicable to the sentences of those already confined, notwithstanding its repeal by the Comprehensive Drug Abuse Prevention and Control Act of 1970. The Court held, *inter alia*, that a previously sentenced drug offender's ineligibility for parole was part of his "punishment," and thus was a "'penalty, forfeiture, or liability' saved from release . . . by 1 U.S.C. § 109." *Marrero*, 417 U.S. at 660-62.

[9] This question has not proved to be a close one in the state and lower federal courts. Nearly every court to address the issue has held that the availability of parole is "annexed" to the crime such as to implicate ex post facto concerns when modified retroactively. *See, e.g., United States v. Meeks*, 25 F.3d 1117, 1121 (2d Cir. 1994); *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993); *Akins*, 922 F.2d 1558; *Fender v. Thompson*, 883 F.2d 303, 307 (4th Cir. 1989); *Schwartz v. Muncy*, 834 F.2d 396, 398 n.4 (4th Cir. 1987); *Burnside v. White*, 760 F.2d 217, 220 (8th Cir.), *cert. denied*, 474 U.S. 1022 (1985); *Lerner v. Gill*, 751 F.2d 450, 454 (1st Cir.), *cert. denied*, 472 U.S. 1010 (1985); *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. Unit A 1981); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170 (7th Cir. 1979); *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977); *Greenfield v. Scafati*, 277 F. Supp. 644, 645-46 (D. Mass. 1967), *aff'd*, 390 U.S. 713 (1968) (*per curiam*); *see also Williams v. Board of Parole*, 112 Or. App. 108, 828 P.2d 465, *review dismissed*, 313 Or. 300, 832 P.2d 456 (1992); *Tiller v. Klincar*, 138 Ill. 2d 1, 11, 561 N.E.2d 576, 580 (1990), *cert. denied*, 498 U.S. 1031 (1991).

In short, the elimination of preexisting eligibility for parole, like any other enhancement of punishment, cannot be effected retroactively consistent with the Ex Post Facto Clause.

II. RETROACTIVE POSTPONEMENT OF A PRISONER'S STATUTORY OPPORTUNITY FOR PAROLE CONSIDERATION INCREASES PUNISHMENT IN VIOLATION OF THE EX POST FACTO CLAUSE.

A. Penal Code § 3041.5(b)(2) Effectively Postpones Morales' Parole Eligibility By Delaying Morales' Parole Consideration Hearings.

Parole suitability "hearings" are the touchstone of parole release in California. By statute, the Board of Prison Terms is permitted to fix a date for a prisoner's release from confinement only through such a hearing. *See* Cal. Penal Code §§ 3041, 3041.5, 3042 (West 1982 & Supp. 1994); *see also In re Jackson*, 39 Cal. 3d 464, 468, 703 P.2d 100, 102 (1985). The nature and extent of the procedural steps the Board must take before, during, and after the hearing make this unmistakably clear.[10] What is more, there is no

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[10] For instance, under California law, the Board must provide thirty days' advance notice of the hearing to, *inter alia*, the judge of the court before whom the prisoner was convicted, "the district attorney of the county in which the offense was committed, the law enforcement agency that investigated the case," Cal. Penal Code § 3042(a) (West 1982 & Supp. 1994), and, upon request, "any victim of a crime committed by the prisoner, or . . . the next of kin of the victim if the victim has died," *id.*

statutory or regulatory mechanism, enforceable or not, by which a prisoner may petition for the determination of a release date outside the parole suitability hearing process. Absent a parole suitability hearing, accordingly, there is no statutory opportunity for a prisoner to obtain parole in California.[11]

At the time of Morales' offense, a prisoner found unsuitable for parole at his initial parole suitability hearing was by statutory mandate entitled to a hearing for reconsideration of that determination in the following year,

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§ 3043. By law, a release date must be chosen at the hearing, and provided to the prisoner within ten days thereafter, unless the Board determines that "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offenses, is such that consideration of the public safety requires a more lengthy period of incarceration." *Id.* § 3041(b). If a release date is chosen or confirmed, the Penal Code bars release of the prisoner until the expiration of sixty days after the date of the hearing. *Id.* If, on the other hand, the Board determines that "consideration of the public safety" prevents selection of a release date, it must inform the prisoner of the basis of its decision in writing, and offer suggestions to the prisoner on how to improve his chances of gaining release in the future. *Id.* § 3041.5(b)(2).

[11] Petitioners assert "that parole suitability hearings are convened solely to gauge the *fitness* of an inmate to have a parole hearing which in turn *might* result in the setting of a parole date for certain felons with indeterminate sentences." (Pet'rs Br. at 10.) The assertion is, at best, mistaken. The hearing at which the Board considers an inmate's fitness for parole is the sole procedural mechanism by which the parole suitability of and release date for offenders in Morales' position are determined. Cal. Penal Code § 3041(a); Cal. Code Regs. tit. 15, § 2401 (1990). If the Board finds an offender suitable for parole at such a hearing, the statute and regulations provide that "[a] parole date *shall* be set." Cal. Code Regs. tit. 15, § 2401 (emphasis added); *see* Cal. Penal Code § 3041(a). Thus, petitioners' suggestion that suitability hearings are a distinct predicate proceeding to a parole hearing is simply wrong.

and in each year thereafter. Cal. Penal Code § 3041.5(b)(2) (*see* J.A. 3). At this hearing, the prisoner was entitled to proffer any circumstances tending to support his suitability for release, *e.g.*, indications that he understands the nature and magnitude of the offense; evidence that he committed the crime as the result of significant stress in his life; evidence that his age reduces the probability of recidivism; evidence that he has made realistic plans for release; evidence that he has developed marketable skills that can be put to use upon release; or evidence that his activities while institutionalized indicate an enhanced ability to function within the law upon release.[12]

The 1981 amendment, however, withdrew this annual entitlement for persons convicted of more than one offense involving the taking of a life, instead permitting the Board to forego reconsideration hearings for as many as three years following a hearing at which parole suitability is denied. Now, only if such persons are able to convince the Board of Prison Terms that it is "reasonable to expect that parole [will] be granted at a hearing during the following years" can they be assured of the annual consideration hearings to which they were previously entitled by statute. As the Ninth Circuit observed, § 3041.5(b)(2), as amended, "permits the Board to frustrate a prisoner's interest in obtaining a parole release date for three times as long as was permitted by prior law."

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[12] Cal. Code Regs. tit. 15, § 2402(d)(3)-(4), (6)-(8) (1990). This list is inclusive, not exhaustive. *See id.* § 2402(d). The applicable regulations permit the offender to proffer other changed circumstances tending to demonstrate his suitability for parole, such as terminal illness, a need to care for a disabled or ill relative, breakthroughs in psychological or pharmacological treatment, or selfless acts such as protecting a guard from harm from rioting prisoners.

Watson v. Estelle, 859 F.2d 105, 109 (1988), *vacated on other grounds*, 886 F.2d 1093 (9th Cir. 1989).[13]

A prisoner whose parole reconsideration hearings have been withdrawn under the 1981 amendment may remain technically "eligible" for parole, in the sense that his confinement may have extended beyond his "minimum eligible parole release date." *See* Cal. Penal Code § 3041(a). But technical "eligibility" for parole is meaningful only insofar as it affords the prisoner an opportunity to gain release from confinement -- that is, an opportunity to demonstrate parole suitability to the Board of Prison Terms. This opportunity can be realized only through a suitability hearing before the Board, the very hearing that the 1981 amendment denies to prisoners in Morales' position for as many as three years. As the Seventh Circuit reasoned in addressing an ex post facto claim similar to that presented here, "[e]ligibility [for parole] in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing." *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979); *see also Roller v. Cavanaugh*, 984 F.2d 120, 123 (4th Cir.) ("Eligibility without consideration is a cold comfort."), *cert. dismissed*, 114 S. Ct. 594 (1993).[14]

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[13] *See also In re Jackson*, 39 Cal. 3d at 473, 703 P.2d at 105 (change embodied in § 3041.5(b)(2) "did eliminate the possibility that a parole date would be set within the period of the postponement").

[14] Petitioners suggest that, under applicable parole suitability guidelines, Morales might not actually be released on parole until the passage of 19 years following his initial confinement and that, because of aggravating circumstances relating to Morales' offense, no "reasonable

By permitting the elimination, for as many as three years, of the annual parole suitability hearings that were required by law at the time of Morales' crime, the 1981 amendment to § 3041.5(b)(2) lengthens the period that a prisoner in Morales' position must serve in confinement following an initial denial of parole before he is again provided an opportunity to obtain early release.

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person could find that [Morales] would be ready for parole" during the period in which his right to annual suitability hearings has been eliminated. (*See* Pet'rs Br. at 21, 22 n.8.) But the guidelines to which petitioners refer are just that -- guidelines. The Board of Prison Terms may depart from the regulations' "suggested base term" to an unlimited extent merely by articulating "particular facts" which it finds justify such a departure. Cal. Code Regs. tit. 15, § 2403 (1990); *see also id.* § 2401 (parole release regulations "are guidelines only").

Moreover, the very "guidelines" to which petitioners refer indicate that Morales may be immediately parolable upon a finding of suitability. In calculating Morales' release date, any "suggested base term" of confinement derived from the Board's sentencing matrix must be reduced by Morales' 1,050 days of preconviction custody and good-time credits. *See id.* § 2411(b); R. 30 (Judgment (July 1, 1982), Ex. 1 to Return to Pet. for Writ of Habeas Corpus). Thus, Morales' suggested base term of confinement would be slightly more than 16 years and one month, not 19 years. In addition, Morales is eligible for up to 50 months of postconviction good-time credit, *i.e.*, up to four months credit for each year he has served (and possibly more, if his "performance, participation or behavior warrants"). Cal. Code Regs. tit. 15, § 2410(b). When these potential credits are deducted from his suggested base term, Morales' adjusted period of confinement is slightly less than 12 years. *See id.* § 2411. Since it is the adjusted period of confinement which governs an offender's suggested release date under the Board's own guidelines, Morales (who has already served 12 years and five months) could be parolable immediately upon a finding of parole suitability. Thus, while petitioners contend that the decision in *In re Jackson* was correct because in that case "there was . . . no evidence of any untoward effect on any *possible* release date" (Pet'rs Br. at 17) (emphasis added), such an untoward effect does exist here.

B. Retroactive Constraints On Parole Consideration, And Thus On Parole Eligibility, Violate The Ex Post Facto Clause.

Petitioners do not dispute that a State violates the Ex Post Facto Clause by retroactively eliminating or postponing a prisoner's parole eligibility. (Pet'rs Br. at 17.) Petitioners also concede that Penal Code § 3041.5(b)(2) postpones opportunities for parole consideration for prisoners in Morales' position. (Pet'rs Br. at 21-22.) Petitioners instead assert that ex post facto protection against retroactive elimination of parole eligibility is available only to those prisoners who can show that they otherwise would likely have been released. This assertion misreads the Court's precedents and distorts the applicable ex post facto standard.

When a statute retroactively forecloses opportunities for reduced or less onerous punishment, the Ex Post Facto Clause does not place the burden on the individual offender to show that he or she would have received a less onerous punishment under prior law. To the contrary, "[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular [offender]." *Weaver*, 450 U.S. at 33 (citing *Dobbert v. Florida*, 432 U.S. 282, 300 (1977)); *see also Lindsey*, 301 U.S. at 401; *Rooney v. North Dakota*, 196 U.S. 319, 325 (1905). If the "challenged provision" retroactively deprives an offender of previously accorded opportunities to gain a shorter sentence of confinement, that provision renders the imposed punishment more onerous as a matter of law.

The leading decision on this issue is *Lindsey v. Washington*, a case ignored by petitioners. *Lindsey* flatly rejected the assertion that a legislature is free retroactively to stiffen the range of possible punishments for a crime, so long as the sentences of the offenders to whom the law is applied

might have been the same under prior law. *See* 301 U.S. at 401-02. In *Lindsey*, the law in effect at the time of the petitioners' crime provided for a maximum sentence of 15 years in prison, but also permitted the sentencing court to impose a prison term of less than 15 years. Washington amended the law between the time of the petitioners' crime and the date of their sentencing to provide simply for a mandatory 15-year sentence, within which the State's Board of Prison Terms was permitted to fix the actual duration of confinement. *Id.* at 398-99. Petitioners received a 15-year maximum sentence.

Before the Court, the *Lindsey* petitioners argued that they had retroactively been deprived of the opportunity for a maximum sentence of fewer than 15 years. Brief for Petitioners at 14-15, *Lindsey*, 301 U.S. 397 (No. 660). The State's response (much like California's here) was that it was quite possible that the Lindseys would have received the same 15-year maximum sentence under the old law. *See* Answering Brief of Appellee at 21, *Lindsey* (arguing that "no court can indulge in the presumption that the court would in any given case impose a lesser maximum term"). Because the Lindseys were thus unable to show any concrete "disadvantage in the matter of the sentence imposed," the State of Washington insisted that the law did not violate the Ex Post Facto Clause. *Id.* at 45-46.

The *Lindsey* Court emphatically -- and unanimously -- rejected this argument, and reversed the petitioners' sentence. The Court focused on whether the statute retroactively increased the "standard of punishment" for the Lindseys' crime, and not at all on whether the Lindseys might (or would) have received the same quantum of punishment under the superseded law. 301 U.S. at 401. "[A]n increase in the *possible* penalty is ex post facto," the Court wrote,

"regardless of the length of the sentence actually imposed, since the *measure* of punishment prescribed by the later statute is more severe than that of the earlier." 301 U.S. at 401 (emphasis added; citations omitted).

Lindsey's treatment of the "detriment" prong of ex post facto analysis bears particular emphasis here. The Lindseys were not required to show a likelihood, or even a realistic possibility, that the judge might have sentenced them to less than the 15-year maximum punishment under the prior law. To the contrary, the Court's ruling unambiguously rests on the fact that a less onerous punishment would have been open to the sentencing judge under the superseded regime. As the Court explained, it was "plainly to the substantial disadvantage of petitioners to be deprived of all *opportunity* to receive a sentence which would [have] give[n] them freedom from custody and control prior to the expiration of the 15-year term." *Id.* at 401-02 (emphasis added); *see also id.* at 401 (the challenged law "operates to [petitioners'] detriment in the sense that the *standard of punishment* adopted by the new statute is more onerous than that of the old" (emphasis added)). Thus, it was Washington's foreclosure of the previously available opportunity that was the gravamen of the ex post facto violation in *Lindsey*, unadorned by any speculation about whether that opportunity was a likely or realistic one.

The *Lindsey* Court's focus on the "standard of punishment" imposed by a retroactive measure is faithful to the long-understood meaning, and long-practiced application, of the Ex Post Facto Clause. Historically, whether a law violated the Ex Post Facto Clause depended not on whether a given offender actually received harsher punishment than he otherwise would have, but on whether the retroactive law provided for the possibility of greater punishment, and thus

presented a risk that the offender's actual punishment might exceed that which would have been imposed under prior law. *See* WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION 253-54 (1904) (statutory changes in punishment with the *potential* to result in increased punishment, no matter to how small a degree, are invalid ex post facto laws).[15]

The unqualified nature of the Ex Post Facto Clause -- that is, its intolerance for the retroactive enhancement of punishment no matter how subtle the attempt, and no matter how compelling the proffered justification for the measure -- helps explain the historical focus (exemplified by *Lindsey*) on whether the challenged law modifies the "standard of punishment" affixed to the crime. The Constitution neither requires nor permits courts to show special solicitude for laws that enhance the *possible* range of punishments applicable to a category of crimes, and has therefore long been understood to command that any doubt about whether a particular retroactive measure has potentially enhanced an offender's punishment be resolved in favor of the offender.[16]

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[15] *E.g., Hartung v. People*, 22 N.Y. 95, 106 (1860) ("It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment, after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law.").

[16] *See, e.g., In re Petty*, 22 Kan. 477, 483 (1879) ("We have no absolute means of saying whether the old or the new law would be the more severe in a given case, and hence we cannot affirm that [the later statute] mitigates the punishment"); FRANCIS WHARTON, COMMENTARIES ON LAW § 472 (1884) (in cases where it is "a matter of dispute whether a penalty attached by a new law is severer than the penalty in force under

The principle announced in *Lindsey* has recently been reaffirmed by the Court. In *Miller v. Florida*, 482 U.S. 423 (1987), the Court held unanimously that the Ex Post Facto Clause prohibits States from depriving an offender of opportunities to obtain a shorter sentence that were available to him under the law in effect at the time of his crime. The petitioner in *Miller* was sentenced under state sentencing guidelines that prescribed a presumptive prison term of five and one-half to seven years. The guidelines in force when he committed his crime prescribed a presumptive sentence of only three and one-half to four and one-half years. Under both statutes, the judge could impose sentences outside the recommended range, provided he gave clear and convincing written reasons. *Id.* at 426-27. Florida asserted in *Miller* that the revised guidelines did not disadvantage the petitioner because he could not "show definitively that he would have gotten a lesser sentence" under the old provisions. *Id.* at 432. The Court was unpersuaded, holding that the State's assertion was plainly "foreclosed" by *Lindsey*. *Id.*

The Court's decision in *Weaver v. Graham* likewise rests on *Lindsey*'s "standard of punishment" principle. *Weaver* addressed a challenge to a retrospective Florida statute implementing a more restrictive formula for awarding inmates "gain-time" credits for time served in compliance with prison rules, and for adequate performance of prison work duties. *See* 450 U.S. at 25-26. Applying *Lindsey*, the Court held that retroactive application of this statute violated the Ex Post Facto Clause by reducing the amount of "gain-time" credits potentially available to a prisoner if he were adjudged by correctional authorities to have behaved

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the old law when the offence was committed," the issue "is to be determined in favor of the accused").

properly, even though it was sheer speculation to assume that Weaver might ultimately be awarded those credits. *Id.* at 33-34. The Court stressed that the constitutional injury was Weaver's loss of "the *opportunity* to shorten his time in prison" through potential accumulation of gain-time credits. *Id.* (emphasis added). *See also Dobbert*, 432 U.S. at 300 ("one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he *might* have received under the old") (emphasis added).[17]

Under these authorities, as Petitioners concede, a State plainly cannot, through retroactive legislation, eliminate the possibility of parole altogether. Neither can it legislate a retroactive postponement of opportunities for early release on parole. The availability and timing of opportunities for early release on parole, like statutory provisions for minimum and maximum periods of confinement, are constituent elements of the punishment prescribed for criminal acts. Just as a State

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[17] The *Lindsey* principle has been widely applied by federal and state courts when addressing statutory changes in prisoners' opportunities for reduced confinement. *See, e.g., United States v. Arzate-Nunez*, 18 F.3d 730, 734 n.2 (9th Cir. 1994) ("the ex post facto inquiry focuses on a defendant's eligibility to receive a certain sentence, not his actual sentence"), *citing United States v. Paskow*, 11 F.3d 873, 877 (9th Cir. 1993); *Watson*, 859 F.2d at 106-07 n.2 ("numerous cases establish that prisoners have an interest protected by the ex post facto clause in programs holding out the possibility of reductions in the duration of their incarceration"); *see also Flemming v. Oregon Bd. of Parole*, 998 F.2d 721, 725 (9th Cir. 1993); *Chatman v. Marquez*, 754 F.2d 1531, 1535 (9th Cir.), *cert. denied*, 474 U.S. 841 (1985); *Dugger v. Williams*, 593 So. 2d 180, 181 (Fla. 1991); *see also Williams v. Florida Parole Comm'n*, 625 So. 2d 926, 935 (Fla. App. 1993), *review denied*, 637 So. 2d 236 (Fla. 1994), and cases cited therein.

cannot retroactively deprive an offender of opportunities to urge the sentencing judge that a shorter period of confinement should be imposed at the outset, *see Lindsey*, 301 U.S. at 401-02; *Miller*, 482 U.S. at 432-35, a State may not retroactively eliminate opportunities for a prisoner to urge the paroling authority that the statutorily permissible option of early release is appropriate in his case. Each category of retroactive legislation removes previously guaranteed opportunities to obtain reduced imprisonment, whether from the sentencing judge (as in *Lindsey* or *Miller*) or from the paroling authority (as in the case at bar).

It is no answer to say, as do petitioners (Pet'rs Br. at 22-23), that any reduction in an offender's confinement stemming from parole is purely a function of the paroling authority's exercise of *discretion*.[18] A sentencing judge exercises discretion to fix an offender's length of confinement

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[18] The federal appellate decisions denying challenges to the retroactive application of parole guidelines by the former United States Parole Commission do not support the proposition that the Ex Post Facto Clause condones retroactive postponement of parole eligibility. As this Court has recognized, most of these decisions held that the guidelines simply rationalize the exercise of previously delegated statutory discretion, or do not constitute "laws" for purposes of the Ex Post Facto Clause at all. *See Miller*, 482 U.S. at 434-35, and cases cited therein. Neither circumstance obtains here.

A few courts disposed of prisoners' ex post facto challenges to the guidelines on the ground that the guidelines do not increase punishment. *See, e.g., Yamamoto v. United States Parole Comm'n*, 794 F.2d 1295, 1300 (8th Cir. 1986); *Dufresne v. Baer*, 744 F.2d 1543, 1547 (11th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). But these courts expressly distinguished retroactive implementation of the guidelines from a retroactive statutory restriction on the availability of parole, indicating that the latter *would* increase punishment in violation of the Ex Post Facto Clause. *See, e.g., Yamamoto*, 794 F.2d at 1300; *Dufresne*, 744 F.2d at 1549-50.

that is indistinguishable from the discretion exercised by a paroling authority to adjust the period of confinement afterward. Both the judge (under the statutes fixing minimum and maximum prison terms) and the paroling authority (under the statutes fixing an offender's eligibility for parole) adjust offenders' periods of confinement within limits established by the legislature. The only difference is that the sentencing judge operates at the front end of the process and the paroling authority at the back end. That California has chosen a regime where the Board of Prison Terms, rather than the sentencing judge, has primacy in fixing offenders' periods of confinement within legislative parameters does not affect the applicability of the Ex Post Facto Clause. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) ("[W]hat cannot be done directly [under the Ex Post Facto Clause] cannot be done indirectly. The Constitution deals with substance, not shadows.").

Measures such as the 1981 amendment to § 3041.5(b)(2), by making unavailable the only mechanism by which a prisoner can obtain parole release, deprive parole-eligible prisoners of opportunities to reduce their periods of confinement. By eliminating chances to obtain an earlier release date, such laws inevitably tend to "punish a prior act in a different and more onerous manner." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1345, at 240-41 (3d ed. 1858) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810)).[19] Here, at the time of Morales' offense, the State legislature had clearly defined the availability and timing of opportunities for consideration of early release on parole. By retroactively lengthening the period of

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[19] Likewise, such laws deprive offenders of the fair notice of the consequences of their acts which the Ex Post Facto Clause guarantees. *See Morales*, 16 F.3d at 1005 (citing *Weaver*, 450 U.S. at 30).

confinement Morales was required to serve until he could next be considered for parole release, the 1981 amendment to § 3041.5(b)(2) unconstitutionally enhanced the standard of punishment applicable to Morales' offense.[20]

C. Section 3041.5(b)(2)'s So-Called "Procedural Safeguards" Do Not Exempt It From Ex Post Facto Scrutiny.

Petitioners claim that there can be no ex post facto problem where the State implements "procedural safeguards" purportedly designed to withdraw early release opportunities only from those offenders whom the State believes are least deserving of such release. (Pet'rs Br. at 16, 21-22.) Petitioners submit that this is such a case. They point to § 3041.5(b)(2)'s requirement that the Board of Prison Terms make a finding that "it is not reasonable to expect that" the individuals for whom it is eliminating annual parole suitability hearings will be given parole dates in the interim. Cal. Penal Code § 3041.5(b)(2) (West 1982). This self-policing quality of the 1981 amendment, petitioners assert, ensures that it cannot violate the Ex Post Facto Clause.

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[20] *Amici* Criminal Justice Legal Foundation, *et al.* argue that this Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), precludes the extension of *Lindsey, Miller*, and *Weaver* to cover Morales' case because each of those cases cited the now overruled cases of *Kring v. Missouri*, 107 U.S. 221 (1803), and *Thompson v. Utah*, 170 U.S. 343 (1898). However, *amici's* arguments do not withstand scrutiny. Morales relies on *Lindsey, Miller*, and *Weaver* for the proposition that application of a harsher "standard of punishment" constitutes harsher punishment for ex post facto purposes, not for the claim that "*all* 'legislative acts'" must give fair warning of their effect. *See* Br. of *Amici* Criminal Justice Legal Foundation, *et al.* at 9. While *amici* are correct that *Lindsey, Miller*, and *Weaver* contain some *dicta* derived from *Kring* and *Thompson*, Morales need not -- and does not -- rely on the *dicta* thus derived.

Petitioners are mistaken. As emphasized earlier, this Court's decisions in *Lindsey, Miller*, and *Weaver* do not hold, or even suggest, that retroactive enhancements of punishment may be sustained as to particular offenders simply because those offenders cannot show that they would have been given a shorter period of confinement under prior law. To the contrary, if retroactive legislation deprives an offender of "all opportunity" for reduced punishment, such legislation is ex post facto whether or not the offender's actual prospects for reduced punishment are substantial. *See Lindsey*, 301 U.S. at 401-02; *cf. Rummel*, 445 U.S. at 281 ("the possibility of parole, *however slim*, serves to distinguish [the petitioner] from a person sentenced . . . without parole") (emphasis added). This is because doubts about the effect of a retroactive measure on the quantum of a particular offender's punishment -- no matter how compelling the legislative

justification for the enhancement[21] -- are to be resolved in favor of the offender. Section II(B), *supra*.

Petitioners' preoccupation with the "procedural safeguards" afforded by § 3041.5(b)(2) betrays their confusion of ex post facto with due process principles. Contrary to petitioners' suggestion, Morales need not establish a "legitimate entitlement to parole" (Pet'rs Br. at 23) in order to claim protection under the Ex Post Facto Clause against retroactive impairment of his parole eligibility. *See Weaver*, 450 U.S. at 29. As this Court announced in *Weaver*, "when a court engages in *ex post facto* analysis, which is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested

[21] *Amici* Pacific Legal Foundation, *et al.* argue that retroactive application of the 1981 amendment to § 3041.5(b)(2) should be upheld as a means to spare victims' families the trouble and expense of appearing at parole hearings. (*See* Br. of *Amici* Pacific Legal Foundation, *et al.* at 22.) Such a consideration cannot overcome the Constitution's unconditional command that "no State . . . shall pass any . . . ex post facto Law." California remains free to enact prospective laws to spare victims' families the rigors of participation in the parole process. The State also has resort to myriad means to conduct annual parole hearings without the direct participation of victims' families (and without offending the Ex Post Facto Clause), such as the use of videotaped or written testimony, *see* Cal. Penal Code § 3043.2 (West Supp. 1994), and the re-use of such testimony in subsequent years.

It bears noting that California first required crime victims and their families to be notified about the scheduling of parole hearings, and to be accorded an opportunity to testify therein, in a statute enacted in 1982, *after* Morales' crime was committed. *See id.* § 3043 (1982). Clearly, the State may not bootstrap its alleged need to address a "problem" created by a statute enacted *after* Morales' crime into a justification for retroactive criminal legislation.

rights." *Id.* at 29-30 n.13. Thus, although § 3041.5(b)(2)'s procedures may be sufficient to preserve Morales' *due process* rights to parole (such as they are), they are wholly incompetent to protect his ex post facto rights against subjection to a statute that "assigns more disadvantageous criminal or penal consequences" to prior acts. *Id.*

In any event, the findings required by § 3041.5(b)(2) do not truly provide procedural safeguards, because they fail meaningfully to distinguish the offenders for whom deferral of eligibility is ordered from those for whom it is not. California's Attorney General conceded as much in his argument to the California Supreme Court in *In re Jackson*, complaining -- with respect to the 1982 amendment to § 3041.5(b)(2) that permitted deferrals of parole suitability hearings for as many as two years for all prisoners -- that the standard for determining a prisoner unsuitable for parole and the standard for determining a prisoner suitable for deferral of parole hearings were virtually identical. The Attorney General concluded that it was absurd to require the Board to issue separate findings as to its application of the two standards. *See In re Jackson*, 39 Cal. 3d at 478, 703 P.2d at 109 ("The Attorney General argues that it is not rational to require two separate statements since such a requirement is 'virtually impossible' to comply with. In his view, '[both] the decision to deny parole and to delay a subsequent hearing for two years must be the same.'").[22]

[22] Morales' own experience illustrates how the two standards are conflated in practice. The Board made four findings to support its denial of parole (as opposed to its postponement decision) at Morales' 1989 hearing: (1) that his crime was "heinous, atrocious and cruel"; (2) that he had a prior record of violent behavior, namely, his prior murder conviction and violation of parole by committing a second murder; (3) he had not participated in beneficial therapy programs while incarcerated;

State and federal courts have uniformly condemned retroactive laws withdrawing or postponing parole eligibility, even where the State has purported to limit eligibility only for those offenders deemed least suitable for release. The great weight of authority holds that a State may not retroactively change a prisoner's initial parole eligibility date, regardless of whether the prisoner's petition for parole release would likely be granted on or about the date of initial eligibility.[23] Similarly, the courts are nearly unanimous in finding ex post facto violations in the circumstances presented here, *i.e.*, when the State retroactively reduces the frequency of a parole-eligible prisoner's consideration for release. Again, the courts have so held without regard to whether the prisoner can demonstrate a likelihood of attaining parole during the period in which the opportunity for consideration is eliminated.[24]

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and (4) "[p]sychiatric factors." (*See* Pet'rs Br. at 7-8.) These findings track the parole guidelines for life prisoners published in the California Code of Regulations. *See* Cal. Code Regs. tit. 15, § 2402(c) (1990). The Board then essentially listed the same factors in support of its decision to deny Morales parole review for the *next* three years. (*See* Pet'rs Br. at 9.) The Board engaged in no independent factfinding at all, preferring -- in fulfillment of the California Attorney General's prophecy in *In re Jackson* -- to let its finding of Morales' current unsuitability for parole do double duty in supporting application of § 3041.5(b)(2)'s three-year deferral provision.

[23] *See Yamamoto v. United States*, 794 F.2d 1295, 1300 (8th Cir. 1986); *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 1100 (1973); *Fender v. Thompson*, 883 F.2d 303, 307 (4th Cir. 1989); *Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 343 (10th Cir. 1989); *Beebe v. Phelps*, 650 F.2d 774, 777 (5th Cir. Unit A 1981); *Geraghty v. United States Parole Comm'n*, 579 F.2d 238, 266 (3d Cir. 1978), *rev'd on other grounds*, 445 U.S. 388 (1980); *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977); *State v. Beachman*, 189 Mont. 400, 406, 616 P.2d 337, 340-41 (1980); *Davis v. Mabry*, 266 Ark. 487, 491, 585 S.W.2d 949, 951-52 (1979); *State v. Mendivil*, 121 Ariz. 600, 602, 592 P.2d 1256, 1258 (1979); *Lee v. State*, 294 So. 2d 305, 306 (Fla. 1974); *State ex rel. Mueller v. Powers*, 64 Wis. 2d 643, 646-47, 221 N.W.2d 692, 694 (1974); *In re Griffin*, 63 Cal. 2d 757, 760, 408 P.2d 959, 961 (1965); *Goldsworthy v. Hannifin*, 86 Nev. 252, 257, 468 P.2d 350, 353-54 (1970); *State ex rel. Woodward v. Board of Parole*, 99 So. 534, 536 (La. 1924); *but see Zink v. Lear*, 28 N.J. Super. 515, 101 A.2d 72 (1953) (changes to parole eligibility dates may be made retroactively).

[24] *See Morales*, 16 F.3d at 1000; *Roller*, 984 F.2d 120 (reduction in frequency of parole hearings from every year to every other year); *Akins v. Snow*, 922 F.2d 1558 (11th Cir.) (reduction in frequency of parole hearings from every year to every 8 years), *cert. denied*, 501 U.S. 1260 (1991); *Watson*, 859 F.2d 105 (1981 amendment to § 3041.5(b)(2)); *Rodriguez*, 594 F.2d 170 (parole hearings reduced from every six months to every eighteen months); *State v. Reynolds*, 642 A.2d 1368, 1370 (N.H. 1994) (right to petition for sentence suspension changed from every two years to every four years); *Griffin v. State*, 433 S.E.2d 862 (S.C. 1993) (parole hearings reduced from every year to every other year), *cert. denied*, 114 S. Ct. 924 (1994); *Tiller*, 138 Ill. 2d 1, 9-11, 561 N.E.2d 561, 578-80 (1990) (parole hearings reduced from every year to every three years if it is found "not reasonable to expect that parole would be granted" in intervening years); *see also State ex rel. Mueller*, 64 Wis. 2d 463, 466-67, 221 N.W.2d 692, 694 (1974) ("Although the decision to refuse or grant parole lies within the discretion of the department [of parole], Wisconsin law grants petitioners as a matter of right the opportunity to be considered for parole after serving a given period of time."); *State ex rel. Woodward v. Board of Parole*, 99 So. 534, 536 (La. 1924) ("[petitioner's] privilege of having his case submitted to the discretion of the board at the proper time" may not be removed retrospectively); *but see In re Jackson*, 703 P.2d at 105 (changing frequency of parole suitability hearings from every year to every other year held not significant enough to violate Ex Post Facto Clause).

In *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992), the court declined to invalidate a statutory reduction in Minnesota's parole hearing frequency. Judge

D. Petitioners Cannot Insulate The 1981 Amendment To § 3041.5(b)(2) From Ex Post Facto Scrutiny Merely By Labelling The Change "Procedural."

Petitioners attempt to save the 1981 amendment to § 3041.5(b)(2) by terming its effect "merely procedural" (Pet'rs Br. at 23), and thus outside the proscription of the Ex Post Facto Clause. This Court has rejected such formalistic arguments in the past, and should reject petitioners' suggestion here.

"[S]imply labelling a law 'procedural' . . . does not thereby immunize it from scrutiny under the Ex Post Facto Clause." *Collins v. Youngblood*, 497 U.S. at 46. To the contrary, a change in a law that alters punishment "can be *ex post facto* 'even if the statute takes a seemingly procedural form.'" *Miller*, 482 U.S. at 433 (quoting *Weaver*, 450 U.S. at 29 n.12). As the Ninth Circuit observed in an opinion that presaged its later judgment in *Morales*, "[t]he distinction between 'procedure' and 'substance' is a commentary on the basic inquiry rather than a separate doctrine." *Watson*, 859 F.2d at 107 n.3. The essential ex post facto inquiry remains whether the "standard of punishment" imposed by retroactive legislation is more onerous than the predecessor statute; if it is, the statute cannot retroactively be applied to an offender

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Bowman's opinion announcing the judgment of the court noted that the change in frequency was based on a change in Minnesota's hearing frequency regulations, which he found not to constitute laws for purposes of the Ex Post Facto Clause. *Id.* at 1157. No other judge concurred in this reasoning, however. *See id.* (Stuart, J., concurring in result); *id.* at 1158-59 (Lay, J., dissenting) (noting that in *Yamomoto*, 794 F.2d at 1300-01, the Eighth Circuit observed that "[a]dverse changes in the frequency with which a prisoner may be *considered* for parole . . . may also violate the ex post facto clause").

whether or not it takes a "procedural" form. Thus, the Court has regularly struck down seemingly "procedural" changes in penal statutes where those changes have the effect of "mak[ing] more burdensome the punishment for a crime" after its commission.[25]

The 1981 amendment to § 3041.5(b)(2) has precisely that effect on the punishment of offenders in Morales' position. Although the amendment technically targets parole *procedures*, its effect on the category of offenders to which it is directed is undeniably *substantive* -- that is, it serves to lengthen offenders' required periods of confinement prior to renewed parole availability.

The retroactive criminal statutes that the Court has sustained against ex post facto challenges illustrate the gulf between the 1981 amendment to § 3041.5(b)(2) and genuinely "procedural" measures. The latter are directed to the manner in which a criminal case is *adjudicated* rather than to the manner in which a previously committed offense is *punished*. *See Collins*, 497 U.S. at 45 ("changes in the procedures by which a criminal case is adjudicated" are generally immune from ex post facto scrutiny); *Dobbert*, 432 U.S. at 293-94 ("The new statute simply altered the methods

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[25] *See, e.g., Miller*, 482 U.S. at 433-34 (sentencing guidelines amendment defended as "procedural" in nature held violative of the Ex Post Facto Clause where amendment "was intended to, and did, increase the 'quantum of punishment'"); *Weaver*, 450 U.S. at 36 n.21 (State's claim that statute altering gain-time computation "is merely procedural" rejected in view of statute's effect on quantum of punishment for offenses previously committed); *cf. Cummings v. Missouri*, 71 U.S. (4 Wall.) at 318, 321, 325 (loyalty oaths, though technically "qualification[s] for holding certain offices," violated Ex Post Facto Clause because they effectively imposed additional "deprivation" on the basis of prior conduct).

employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."); *Hopt v. Utah*, 110 U.S. 574 (1884) (retrospective statute making admissible testimony by felons held to be directed to methods of adjudication); *Thompson v. Missouri*, 171 U.S. 380 (1898) (retrospective statute making handwritten documents admissible for use as handwriting exemplars held procedural); *Beazell v. Ohio*, 269 U.S. 167 (1925) (retrospective statute eliminating right to separate trial for co-conspirators held procedural); *Malloy v. South Carolina*, 237 U.S. 180 (1915) (retrospective statute substituting one form of evidence for another held procedural). Changes in adjudicatory procedures, while arguably disadvantageous to the occasional specific defendant, do not disadvantage the entire category of offenders to which they apply.[26] Because the adjudicatory procedures in force in a given jurisdiction therefore cannot be thought to influence an offender's primary conduct, changes in those procedures do not implicate the fair notice concerns that are at the core of the Ex Post Facto Clause. *See, e.g., Dobbert*, 432 U.S. at 297-98, 301.

The 1981 amendment to § 3041.5(b)(2) does not retroactively change the way criminal cases are *adjudicated*.

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[26] For instance, in *Dobbert*, the Court concluded that the challenged retrospective legislation making advisory (rather than mandatory) a sentencing jury's determination as to whether the death penalty or life imprisonment should be imposed could well spare a defendant of what would otherwise be a binding jury determination of death just as frequently as it could result in judicial rejection of a jury recommendation of life. *See* 432 U.S. at 294-97. Thus, even though the petitioner in *Dobbert* had been sentenced to death by the trial judge in derogation of a jury recommendation of life imprisonment, the Court rejected the petitioner's contention that the legislation violated the Ex Post Facto Clause. *Id.*

Instead, the amendment retroactively changes the way prisoners in Morales' position are *punished* by lengthening prisoners' required periods of incarceration prior to renewed opportunities for parole. Unlike the "procedural" enactments the Court has sustained against ex post facto challenges, the 1981 amendment disadvantages *all* offenders to whom it applies. The amendment has none of the potentially ameliorative qualities that characterize permissible retroactive changes in criminal adjudicatory procedures. Like many other changes in so-called "procedures" governing prisoners that the Court has addressed over the years, the 1981 amendment to § 3041.5(b)(2) is undeniably substantive in effect, and may not be applied retroactively. *See, e.g., In re Medley*, 134 U.S. 160 (1890) (retroactive requirement that prisoners on death row be placed in solitary confinement pending execution held violative of Ex Post Facto Clause); *Weaver*, 450 U.S. at 30 (retroactive change in procedure for calculating gain-time credits held to be ex post facto as to prisoners sentenced prior to enactment).

III. THERE IS NO *DE MINIMIS* EXCEPTION TO THE EX POST FACTO CLAUSE.

At bottom, petitioners and their supporting *amici* urge the creation of a *de minimis* exception to the ex post facto prohibition. They request, in substance, that the Court sustain retroactive application of § 3041.5(b)(2) because it operates to defer parole eligibility only for a class of prisoners whose chances of actually receiving parole are slim anyway. (*See, e.g.*, Pet'rs Br. at 21-23.) The suggestion should be rejected. Nothing in the text or history of the Constitution, the decisions of this Court, or the principles animating the Ex Post Facto Clause even intimates that retroactive enhancements in punishment may be imposed provided the enhancements are small.

The Court has refused to sanction retrospective enhancements in punishment even of modest proportions. In *In re Medley*, the Court struck down a retroactive state law that required offenders sentenced to death to be housed in solitary confinement prior to their execution, ruling that the imposition of confinement away from other prisoners "was an additional punishment" violative of the Ex Post Facto Clause. 134 U.S. at 171. The *Medley* Court found an additional ex post facto violation in the law's retroactive requirement that death row prisoners be informed only of the specific week within which their execution was set, rather than the specific date of execution. *Id.* at 172-73. The Court reached these results over the vigorous objections of two dissenting justices who explicitly urged recognition of a *de minimis* exception to the ex post facto proscription that would shelter what they termed to be "trifling" enhancements. *See id.* at 175 (Brewer, J., dissenting).

Thus, whether the range of confinement prescribed for a particular offense is enhanced dramatically by multiples of years, or marginally by multiples of days, the Ex Post Facto Clause enjoins its accomplishment retroactively. And whether a statute heightening the "standard of punishment" has certainly, likely, possibly, or even remotely increased the actual punishment given a particular offender is irrelevant for purposes of applying the Ex Post Facto Clause. *Cf. Lindsey*, 301 U.S. at 401-02. As the Court observed in *Collins*, "[s]ubtle ex post facto violations are no more permissible than overt ones." 497 U.S. at 46.[27]

[27] Petitioners assume that because only a small percentage of the offenders subject to the 1981 amendment might, as a consequence, serve longer periods of confinement, the provision is somehow insulated from condemnation under the Ex Post Facto Clause. This contention has no basis in the Court's decisions. The important question, as this Court has emphasized, is whether punishment *for the category of offenders to which the retroactive law applies* has been enhanced. If it has, the law violates the Ex Post Facto Clause, no matter how small the number of offenders whose actual punishment turns out to exceed that which they would have obtained under the prior law. Notably, petitioners do not take the position that offenders in Morales' position have no chance of gaining release on parole during the period of their terms of imprisonment.

Petitioners' *de minimis* approach would also be impossible to implement. This case amply illustrates the difficulty. The 1981 amendment to § 3041.5(b)(2) purports to distinguish between prisoners who have twice been convicted of an offense involving the taking of a human life and other prisoners, finding the former to be somehow uniquely unsuitable for annual parole consideration. Yet petitioners offer no principle by which a court could conclude that offenders in Morales' position are categorically unsuitable for parole vis-a-vis others who have been convicted of homicides, or even others who have been convicted of serious crimes, especially when the applicable state law makes all such offenders eligible for parole.

While the 1981 amendment decrees that a three-year delay in parole consideration hearings is appropriate for offenders in Morales' position, and possibly may not lengthen the confinement of any offender subject to it, there is no principled way to determine how significant a risk of enhanced confinement is to be tolerated through such hearing delays. Inevitably, as the period between parole hearings lengthens, the number of prisoners who might otherwise have been paroled in the interim in view of changed circumstances grows larger. A prisoner who might not have made sufficient progress toward rehabilitation in three years might well be able to demonstrate such progress in five years, or eight

years, or ten years, and be able to urge these facts to the paroling authority in support of early release.

Petitioners claim that a statute affecting the timing of parole hearings crosses the *de minimis* threshold only when it affects the parole eligibility of offenders whose chances of parole release are deemed genuine or "reasonable." They further assert that courts are competent to police such statutory changes, and to enjoin application of retroactive postponements of parole consideration to offenders whose factual prospects of parole meet this undefined constitutional minimum. (Pet'rs Br. at 19-23.) But it is too much to ask a court, as a necessary first step in the resolution of an ex post facto claim, to engage in a speculative assessment of the likelihood that an offender will be able to convince a paroling authority to exercise its discretion in favor of release if more frequent parole consideration hearings are provided. Under petitioners' regime, courts would be required to act as rump parole boards -- and to determine the factual prospects for early release -- in order to resolve each and every prisoner's ex post facto claim growing out of statutory postponements of parole consideration. To make matters worse, courts would likely face this routine with respect to *each* prisoner whose hearings are deferred under provisions such as § 3041.5(b)(2), and with respect to *each and every* successive deferral decision, given that a prisoner's factual prospects for release typically change over time.

Expending judicial resources in this fashion would not only be wasteful in the extreme, but also would involve the judiciary in inquiries that are not properly "judicial" in nature. In California, as in other States, the parole decision "'involves the deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and

of the public.'" *In re Powell*, 45 Cal. 3d 894, 902, 755 P.2d 881, 886 (1988). The endeavor required by petitioners' approach -- unguided speculation concerning how a paroling authority might apply its broad discretion as time unfolds, or as new facts and circumstances suggesting a prisoner's further rehabilitation emerge -- is simply not within the institutional competence of the courts. Where, as here, a decision has been committed to the near-absolute discretion of an administrative body, there are no judicially manageable standards by which a court can assess the likelihood that such discretion will be exercised one way or the other. *See Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987) ("parole release decisions are inherently subjective and predictive"); *id.* at 384 (O'Connor, J., dissenting) ("An appellate court reviewing the decision of the [Parole] Board that release of a prisoner would not be 'in the best interests of society' or would be 'detriment[al] . . . to the community' would have little or no basis for taking issue with the judgment of the Board.").

The experiences of other courts illustrate the difficulty of drawing a *de minimis* line. The one court to uphold a retroactive change in the frequency of parole consideration hearings (from once yearly to once every two years) found the ex post facto question "close," but sustained the law in the belief that it did not "significantly impair[]" a prisoner's opportunity for release. *In re Jackson*, 39 Cal. 3d at 472, 476, 703 P.2d at 105, 109. In so deciding, the Supreme Court of California observed:

> Obviously, the right to be heard is an important right. Restrictions on this right may have significant consequences. For this reason, not every retrospective encroachment on the right to

> annual review will pass muster under ex post facto principles as "merely procedural."

39 Cal. 3d at 477 n.12, 703 P.2d at 108 n.12. Perhaps because *Jackson* was the first case to address a retroactive change in the frequency of parole hearings, the *Jackson* majority failed to anticipate the inexorable legislative demands for further "retrospective encroachment on the right to annual review" that would be unleashed by judicial approval of the practice. Predictably, in the wake of *Jackson* California has moved well down the slippery slope. In 1981, the California Legislature approved the law at issue here, permitting three-year postponements for those convicted of two offenses involving the taking of human life. It quickly followed that legislation with permission to make two-year postponements for any offender. And effective January 1, 1995, California will permit five-year deferrals of parole consideration for *any* prisoner convicted of murder. In light of what petitioners themselves describe as "the national trend toward . . . harsher penalties and conditions of confinement for offenders and inmates" (Pet'rs Br. at 11), this progression is hardly surprising.[28]

The Supreme Court of South Carolina originally followed California's lead, upholding a one-year postponement provision on the grounds that the change had little effect on punishment, and so was "procedural." *See Gunter v. State*, 378 S.E.2d 443, 444 (S.C. 1989). A few

[28] Nor was such a pattern of creeping retroactivity beyond the foresight of the Founding Fathers. As James Madison wrote long ago on the subject of ex post facto legislation, "one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." THE FEDERALIST NO. 44, at 283 (James Madison) (Clinton Rossiter ed., 1961).

years later, however, in *Griffin v. State*, 433 S.E.2d 862 (S.C. 1993), *cert. denied*, 114 S. Ct. 924 (1994), South Carolina reversed course, concluding that it was logically impossible to exempt from ex post facto analysis laws postponing parole review for even a single year. The unanimous South Carolina court observed that the Georgia law at issue in *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991), which allowed parole authorities to postpone hearings for up to eight years, "was an example of how a procedural change could be expected to have substantive effect." 433 S.E.2d at 864. Further, the court observed that if an eight-year retroactive postponement of parole consideration violated the Ex Post Facto Clause, there could be no principled rationale for permitting even a one-year postponement:

> It is difficult to determine where the difference lies between a review once every two years and once every eight years. This gray area tortures the ex post facto analysis between a change in standards for review and a procedural change in timing. . . . We must now acknowledge that where a procedural rule is so overly intrusive that it substantively affects the review standard, it then becomes an ex post facto violation.

Id.

There is, in short, no principled means of distinguishing between statutes that retroactively defer parole review for "just a few" years and those that effect deferral for many years. A prisoner's statutory eligibility for parole is part of his punishment for ex post facto purposes, and such eligibility may not be deferred by States in the guise of retroactive constraints on the frequency of parole consideration hearings.

CONCLUSION

The Court of Appeals for the Ninth Circuit properly held that a State cannot retroactively delay a prisoner's statutorily mandated parole hearings without violating the Ex Post Facto Clause. A prisoner's statutory eligibility for parole release is an integral and important mitigating aspect of punishment. Retroactive delays in parole hearings make punishment more onerous by eliminating opportunities for release. Contrary to petitioners' assertion, the Ex Post Facto Clause does not place the burden on the offender to show what punishment he or she would have received under the less onerous prior law. Rather, an ex post facto violation occurs whenever a State retroactively prescribes a more onerous standard of punishment, and applies that new standard to prior acts. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 93-1462

In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSE RAMON MORALES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Morales v. Cal. Dept. of Corrections, 16 F.3d 1001 (9th Cir. 1994), the Ninth Circuit opinion below, suffers from two grave defects. The first is readily apparent on its face and the other is not.

First, *Morales* explicitly holds that a retrospective reduction in the frequency of parole *suitability* hearings violates the prohibition against ex post facto laws. In other words, the Ninth Circuit, on the basis of a wholly inadequate record, found that Morales had met his burden of proof on habeas corpus, bringing forth convincing evidence that he was in custody contrary "in violation of the Constitution". 28 U.S.C. section 2241(3). However, the record discloses that Morales did not and could not put forth even a colorable argument that the alleged violation worked more than mere speculative, insubstantial harm to him, and therefore *Morales* must be reversed because Morales' claims have no practical substance under *Weaver v. Graham*, 450 U.S. 24, 32 (1981). This is the approach suggested by the concurring opinion in *Collins v. Youngblood*, 497 U.S. 37, 58 (1990) [Stevens, J., concurring]. The undisputed findings of the parole board, based on the particular facts of respondent's case, establish the lack of harm to respondent and that it was not the amendment of the law which led to the postponement of the suitability hearings but rather respondent's own deeds. There was nothing categorical about the parole board's decision.

A more subtle and important defect, and one that undermines both *Morales* and *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993), *cert. granted*, 113 S.Ct. 2412, *cert. dism.*, 114 S.Ct. 593, is the unspoken evasion of this

Court's majority holding in *Collins v. Youngblood, supra* at 50. *Collins* states unequivocally that as a threshold matter, no inmate may claim that he has been subjected to an ex post facto law unless the law in question is within one of four categories outlined in *Calder v. Bull*, 3 Dall. 386, 390 (1789). In the instant case, the only plausible relevant category is the third *Calder* category, increase in punishment. Yet absent in both *Morales* and *Roller* is any discussion of how the particular parole procedure at issue increases punishment greater "than the law annexed to the crime[] when committed".

This Court cannot accept the unstated and uncritical premise of *Morales* and *Roller* that *all* parole procedures are a part of criminal punishment and simultaneously honor the analysis in *Collins* and *Calder*. *Morales* itself suggests that *Warden v. Marrero*, 417 U.S. 653, 662 (1974), *reh. den.*, 419 U.S. 1014, holds that all parole procedures are within a *Calder* category, a contention that will not bear close examination.

In light of the substantial number of cases extant among the circuits as to the application of the ex post facto clause to various parole procedures, it is necessary for this Court to state unequivocally that no new parole procedure implicates the ex post facto clause unless the change comes within a *Calder* category as integral to the criminal term itself. Unless a parole procedure or condition was pronounced as part of or as a contemporaneous adjunct to a term of years, that parole is not part of the punishment imposed and no ex post facto argument may be entertained. The majority and concurring approaches outlined in *Collins* appear to be irreconcilable in the contexts of the instant case and *Roller*. Therefore, this Court

must reexamine the issue and state which is the true test for ex post facto claims regarding parole.

ARGUMENT

THE EX POST FACTO CLAUSE DOES NOT BAR RETROSPECTIVE APPLICATION OF A LAW AUTHORIZING LESS FREQUENT PAROLE SUITABILITY HEARINGS WHEN THE PAROLE BOARD, IN THE EXERCISE OF ITS STATUTORY AND DISCRETIONARY POWERS, DETERMINES THAT MORE FREQUENT HEARINGS WOULD BE FUTILE

In the instant case, the Ninth Circuit held that the 1981 amendment of section 3041.5(b)(2) was an ex post facto law as to respondent. In doing so, the Ninth Circuit found that the 1981 amendment "denied Morales opportunities for parole that existed under prior law, thereby making [his] punishment . . . greater than it was under the law in effect at the time his crime was committed." *Morales v. Cal. Dept. of Corrections, supra* at 1004.[1] Petitioners have demonstrated that respondent did not present even a colorable case of detriment or harm, let alone convincing evidence (*Sumner v. Mata*, 449 U.S. 539, 551 (1981)), and therefore there was no factual basis for relief, i.e. for the district court to hear the petition or grant relief

[1] Respondent, without citation, seems to imply that he may not ask for a suitability hearing if it had been determined that he would not receive annual suitability hearings. Resp. Brief at 17. The record is devoid of any evidence to support this claim and the practice of the Board is that it will review for merit any communication from an inmate asking for an earlier suitability hearing.

under sections 2241(3) and 2254 of Title 8, U.S. Code.[2] Pet. Brief on the Merits at 21; see *Weaver v. Graham, supra* at 32.

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[2] Respondent claims that his term of imprisonment, had parole been granted at the initial suitability hearing, would be "slightly less than 12 years" or 1994. Resp. Brief at 19, fn. 14. This contention is based on a profound misconception of California law regarding sentencing. First, respondent claims that his postconviction credit based upon section 2931 of the California Penal Code applies to his term of imprisonment, but in reality it only applies to his minimum eligible parole date, i.e. the date upon which he receives his first suitability hearing. It has nothing to do with setting a parole date other than its effect on when the initial suitability hearing is held. *In re Diaz*, 13 Cal.App.4th 1755, 1760, 17 Cal.Rptr.2d 395 (Ct.App. 1993); *In re Dayan*, 282 Cal.Rptr. 269, 271 (Ct.App. 1991); *In re Monigold*, 139 Cal.Rptr. 689, 702 (Ct.App. 1983).

Second, the suggestion that the Board of Prison Terms would depart from the guidelines to give respondent a *lesser* term than the norm is patently absurd. The Board clearly felt that respondent was such an undeserving candidate for parole that it refused to give him annual suitability hearings. A fortiori, it would not have given him an early parole date. The suggestion that the Board would, in its discretion, award respondent four months of credit per annum against the parole date when awarded is similarly flawed. No such credit appears in the record, despite the fact that such credit could be awarded during an initial suitability hearing if the inmate had been found suitable for parole.

Respondent appears unwilling to admit that the Board's clear and unanimous conclusion was that he was simply and totally unworthy of annual suitability hearings or a parole date, much less credit to reduce a parole date. Instead of making reference to the record, he indulges in fantasy and speculation about what might have happened had he not been the person he is. In this, he simply emulates the Ninth Circuit's approach to the problem.

"The ex post facto clause does not deal with fiction." *Watson v. Estelle*, 886 F.2d 1093, 1097 (9th Cir. 1989). If the new parole condition is no more onerous than the previous state of affairs, there can be no ex post facto claim. See *Lightsey v. Kastner*, 846 F.2d 329, 333-334 (5th Cir. 1988), *cert. den.*, 109 S.Ct. 807; *Tripati v. U.S. Parole Comm.*, 872 F.2d 328, 330 (9th Cir. 1989). Consequently, *Morales* should be reversed on this jurisdictional basis alone. This result would be in agreement with the concurring opinion in *Collins*:

> The mere possibility of a capricious and unlikely windfall is not the sort of procedural protection that could reasonably be judged substantial from the perspective of the defendant at the time the offense was committed.

Collins v. Youngblood, supra at 61 [Stevens, J., concurring];[3] see *Dobbert v. Florida*, 432 U.S. 282, 292, fn. 6 (1977).

However, the majority opinion in *Collins* had sought to repudiate the doctrine that showing detriment was enough to establish an ex post facto violation. "[M]ere disadvantage to the defendant will not result in an ex post facto problem." *U.S. v. Johns*, 5 F.3d 1267, 1271 (9th Cir. 1993). Statutes violate the ex post facto clause only when they come within four categories outlined in *Calder v. Bull, supra* at 390. In the instant case, the only possible applicable *Calder* category is the third. Respondent must

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[3] Respondent misunderstands this argument when he states there is no de minimis violation of the ex post facto clause. Resp. Brief at 37. The primary jurisdictional issue is whether petitioner failed to meet his burden of proof on habeas corpus, as the petitioners failed to do in *Collins* and in *Powell v. Ducharme*, 998 F.2d 710, 715 (9th Cir. 1993).

show that the altered frequency of the parole suitability hearings increases the punishment for his crime. *Collins v. Youngblood, supra* at 42; see *Miller v. Florida*, 482 U.S. 423, 429 (1987); *Malloy v. South Carolina*, 237 U.S. 180, 183-184 (1915); *Tapia v. Superior Court*, 807 P.2d 434, 441 (Cal. 1991).

Thus a second weakness of *Morales* (and of *Roller*) is that neither obeys this Court's explicit directive in *Collins* that no harm to the inmate, no matter how substantial, will implicate the ex post facto clause unless the changed law is within one of four *Calder* categories.[4] *Roller*, for example, cites *Collins* as authority for the proposition that "changes in the manner of reimposing sentence after the original sentence is set aside" do not present ex post facto problems. *Roller v. Cavanaugh, supra* at 123, fn. 4. Such use

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[4] Respondent constantly confuses whether there is a factual basis for postponement of the suitability hearings with the principal legal issue in *Collins*, i.e. whether the amended statute increases the punishment for the crime. The amended statute itself does not mandate postponement for all, i.e. it did not expand "the class of prisoners subject to . . . delays" as respondent claims. Resp. Brief at 4. Rather it is the facts of respondent's case which, in the considered opinion of the prison board, led to the postponement. Thus, it is erroneous to claim that respondent was "categorically unsuited" for parole because of the enactment of the amended statute (Resp. Brief at 39) or that "the 1981 amendment denies [parole] for three years." Resp. Brief at 18. The amended statute provided for an exercise of discretion. That exercise of discretion, embodied in the statutorily authorized findings of the parole board, vitiates both the substantial harm argument and the argument that the amendment works to the harm of whole categories of inmates.

of *Collins* betrays a misunderstanding of the importance of that case.[5]

Yet another example of how this aspect of *Collins* has not been honored in the parole area is *Flemming v. Ore. Bd. of Parole*, 998 F.2d 721, 724-725 (9th Cir. 1993). First, the main *Collins* holding regarding the *Calder* categories is ignored. *Id.* at 723. Second, *Weaver* is read to hold that any reduction of early release opportunities occasioned by the reduction of credits against the sentence violates the ex post facto clause. *Id.* at 724; *Weaver v. Graham*, 450 U.S. 24, 33 (1981). We are told that Weaver's opportunity to shorten his time in prison was the crucial factor in the case, not whether or not the credits were part of the sentence under *Calder*.[6]

In a similar fashion, *Morales* cites *Collins* solely for the proposition that a more burdensome punishment would be an ex post facto law, while ignoring the *Calder* categories altogether. *Morales v. Cal. Dept. of Corrections, supra* at 1003. *Morales* then cites *Warden v. Marrero, supra* at 662 for the proposition that "the denial of parole is part of a defendant's punishment". As pointed out by the States of Pennsylvania and Georgia in their amicus curiae

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[5] Respondent makes much of cases which supposedly hold that parole is annexed to the crime within *Calder*. Resp. Brief at 14, fn. 9. Of much greater concern in the instant case are those courts which have chosen to ignore the necessity of making such a finding, including the Ninth Circuit. See *infra* at 12 et seq.

[6] Similarly lacking in *Collins/Calder* analysis are *Flemming v. Oregon Bd. of Parole*, 998 F.2d 721, 724-727 (9th Cir. 1993) and *Nulph v. Faatz*, 27 F.3d 451, 454 (9th Cir. 1993). Even *Powell v. Ducharme, supra*, a case which at least managed to reach the right conclusion, fails to give proper deference to *Collins*.

briefs, *Marrero* cannot stand for this broad proposition. Brief of Amicus Curiae State of Pennsylvania at 4 et seq.; Brief of Amicus Curiae State of Georgia at 6.

The point made by *Marrero* is that under the specific sentencing statute in question, eligibility for parole was determined at the time of sentencing and therefore was part of the punishment pronounced in the case. To put it another way, "parole eligibility [was] a function of the length of the sentence fixed by the district judge". *Warden v. Marrero, supra* at 654.[7]

In *Marrero*, the parole board's discretion to decide the prisoner's release date did not override the sentencing court's decision because:

> [I]t could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible [for parole]."

Id. at 658.

Thus, an inmate under a hypothetical system of state sentencing who received a determinate sentence *and* parole would present the clearest case for an ex post facto argument if the determinate term of parole was later changed to the inmate's detriment. An inmate who received a 15-year term for murder and a subsequent 5-year parole term pronounced at the time of sentence would clearly be within the third category of *Calder* if the term of parole were later amended to a 10-year term.[8]

On the other hand, an inmate sentenced to an indeterminate term, with parole suitability to be determined later by the parole board, has no ex post facto claim if the board later decides to review his suitability for parole every three years instead of annually. A "pragmatic view of sentencing" (*id.* at 654) should govern, and the principal issue should be whether the parole in question is integral to the sentence, i.e. was pronounced as part of or as a contemporaneous adjunct to a term of years. If it is not, then the "parole [issue] arises *after* the end of the criminal prosecution, including imposition of sentence"

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[7] Contrary to respondent's suggestion, California law does not require that elaborate advisement of parole possibilities be made during sentencing to an indeterminate term. As stated in *People v. Huynh*, 281 Cal.Rptr. 785, 795 (Ct.App. 1991):

> The United States Supreme Court has indicated there is no federal constitutional requirement that the state "furnish a defendant with information about parole eligibility" prior to a guilty plea. (*Hill v. Lockhart* (1985) 474 U.S. 52, 56 . . .) We do not regard the ordinary minimum term before parole eligibility to be a direct consequence of a conviction. . . . [D]efendant's possible parole is dependent on the Board of Prison Term's evaluation of his conduct as a prisoner. Elaborate judicial advice about the prospect of parole and the effects of conduct and worktime credits is not required. . . . We will not require trial courts to read the Board of Prison Term's parole eligibility regulations to defendants in anticipation of a guilty plea.

[8] This form of rigid determinism is apparent in the pre-Guidelines federal sentencing discussed in *Marrero* as well as the current Guidelines sentencing. See *U.S. v. Seacott*, 15 F.3d 1380,.1384 (7th Cir. 1994).

and therefore cannot be within *Calder* or *Collins*. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *Warden v. Marrero*, *supra* at 659, fn. 9.[9]

Marrero contains dicta which may be misinterpreted because of a confusion in the meaning of the term "parole eligibility":

> There are additional reasons [not arising from statutory interpretation] for believing that the no-parole provision is an element of respondent's "punishment." First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. . . . Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause . . . of whether it imposed a "greater or more severe *punishment* than was prescribed by law at the time of the . . . offense". . . .

Id. at 662-663. The phrase "parole eligibility" as used in *Marrero* does not have the same meaning as the phrase "parole suitability" in California law. "Parole eligibility" refers to the general possibility of parole. "Parole suitability" is a term of art with precise technical meaning.[10]

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[9] Those cases which emphasize that there is no ex post facto violation where the parole board has great discretion are explainable as cases which hold there is such a great separation between the imposition of the criminal sentence and the setting of a parole date as to vitiate any claim that parole is linked to the sentence. See *Malek v. Haun*, 26 F.3d 1013, 1016 (10th Cir. 1994); *Freeman v. State*, 809 P.2d 1171, 1176 (Ida. 1991).

[10] For example, respondent uses the term "parole consideration". Resp. Brief at 6. Such imprecise phrasing illustrates the need to closely examine the relevant California law. An inmate is before the Board of Prison Terms to determine his *suitability* for parole and not to *consider* his *eligibility* for parole.

Marrero must be read to say that a penalty is lengthened within the ex post facto clause when an inmate who might have paroled at the time of the commission of his offense is held to be denied any possibility of parole by a subsequent law. By contrast in the instant case, a California inmate who receives an extension of the time between parole suitability hearings is necessarily one sentenced to an indeterminate life sentence and therefore there are no defined or specific number of years in his term. Moreover, under California law the inmate has no specific date when he must be given parole and no commitment has been made to give the inmate parole. See generally *In re Jackson*, 703 P.2d 100, 101 (Cal. 1985).

Therefore, the "parole eligibility" situation presented in *Marrero* is not now before this Court. *Marrero* deals with a change in the minimum number of years before parole becomes a possibility and its broad language has been misinterpreted by courts to cover every aspect of the parole process. The salient features of the California parole procedure in the instant case present an opportunity for this Court to correct this misinterpretation and remind the lower courts of the primary analysis set forth in *Collins*. Unlike *Marrero*, the instant case deals with an inmate whose parole suitability is unconnected with the sentence pronounced by the trial court. The indeterminate life sentence received by the respondent contained no promise of parole, let alone a date certain for parole. Indeed, the respondent's prospects for obtaining a parole

date are so speculative that it would be a waste of time to consider his status annually and the parole board so found as it was required to do by state law. See Cal. Penal Code section 3041.5(b)(2)(B).

Petitioners have previously pointed out that the cases cited by *Roller* have incorrectly reasoned that a retroactive reduction in the frequency of parole consideration violates the ex post facto clause. Pet. Brief on the Merits at 19 et seq. It is instructive to review these cases and those cited in *Morales* and *Flemming* in light of what appears to be a reasonable interpretation of *Marrero*. See *Roller v. Cavanaugh, supra* at 123; *Morales v. Cal. Dept. of Corrections, supra* at 1004; *Flemming v. Ore. Bd. of Parole, supra* at 724.

In *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977), the parole board during its 1977 parole revocation considered a 1976 parole criterion which was not in effect when the inmate was convicted in 1972. *Id.* at 652. Citing *Marrero* for the proposition that parole eligibility is an integral part of the sentence, the court found that use of the new criterion was a violation of the ex post facto clause.[11] *Id.* at 654.

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[11] Inter alia, the court cited *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), *vac. as moot*, 409 U.S. 1100. *Love* is close to *Morales* in that *Love* held that the minimum period of time prior to parole eligibility may not be changed to the inmate's detriment without implicating the ex post facto clause. *Love* is regularly cited despite the fact that the opinion was vacated by this Court and is a nullity. *Roller v. Cavanaugh, supra* at 123; e.g. *Warden v. Marrero, supra* at 663; *U.S. v. Paskow*, 11 F.3d 873, 878 (9th Cir. 1993); *Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir. 1991).

In fact, *Shepard* is primarily a case turning on detriment analysis rather than the *Collins/Calder* analysis. *Id.* Although *Calder* is mentioned in *Shepard, Marrero* is taken to mean that "parole eligibility is considered an integral part of any sentence". Therefore, "official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription". Moreover, based upon a rather broad reading of *Lindsey v. Washington*, 301 U.S. 397 (1937), *Shepard* concludes that the ex post facto clause has been transgressed "even if the maximum statutory penalty for the crime remains unchanged." *Shepard v. Taylor, supra.*

Rodriguez v. U.S. Parole Comm., 594 F.2d 170 (7th Cir. 1979) follows the letter of the law in declaring the principal issue to be whether a particular parole procedure makes the punishment for a crime more burdensome. *Id.* at 173. However, *Rodriguez* then cites *Marrero* for the proposition that when Congress had made it clear that the parole procedure was part of punishment, parole is an extension of the sentencing process, the ex post facto clause is brought into play. *Id.* at 175-176. *Rodriguez* and *Marrero* are similarly limited to their facts and cannot be used to generalize about all revisions of parole procedures.

U.S. ex rel. Graham v. U.S. Parole Comm., 629 F.2d 1040 (5th Cir. 1980) concerned the timing of parole hearings. Most instructive is its use of two hypothetical situations which illustrate the court's concept of ex post facto doctrine. *Id.* at 1043-1044.

> Assume that, under the amended regulations, the Parole Commission schedules Prisoner X at his initial hearing for presumptive release in

three years and six months. Two years later, at X's interim hearing, the evidence reveals that he has been a model prisoner and has attained a college degree since the time of his initial hearing. If the Parole Commission does not deem these circumstances "clearly exceptional" [as required under the amended subsequent regulations], then it will not advance X's presumptive release date, and he will be required to spend another year and a half in jail. Now assume that X's parole eligibility is governed by the regulations in effect in 1974 [, prior to the amendment of the regulations]. At X's three-year review hearing, the Parole Commission, unconstrained by a "clearly exceptional circumstances" standard, might well be convinced by the same evidence to advance his presumptive release date six months and release him immediately. Thus, in this scenario, the net effect of the "clearly exceptional circumstances" is to postpone X's release on parole and keep him incarcerated for an additional six months.

The court's implication is that if the Parole Commission feels itself constrained by the new standard, this would be a violation of the ex post facto clause. Clearly, *Graham* is both a procedure/substance and a substantial detriment case and therefore it lacks the *Collins* analysis. Its "procedure-substance" distinction discredits it under *Collins*. *Id.* at 1044. Its utility is limited by its failure to discuss *Calder* and its assumption that *Marrero* had determined that all parole procedures were within *Calder*. *Id.* at 1042-1043. Moreover, the court seems to imply that if the Parole Commission's discretion is exercised in any way but one, it violates the Constitution. The court seems to

override the parole board's discretion without consideration of the connection between the criminal sentence and the timing of the parole hearings.

Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) utilizes the *Marrero* dictum that a repealer of parole eligibility previously available would create a serious ex post facto question. *Id.* at 305; *Warden v. Marrero*, *supra* at 663. Without further discussion, the court then held that a subsequent statute which withdrew parole eligibility altogether was a violation of the ex post facto clause.[12]

Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988) is clearly a dead letter, having been vacated and replaced by the opinion at 886 F.2d 1093 (9th Cir. 1989). The latter case finds that the parole procedure in question was not more onerous than the prior state of the law and therefore could not be a constitutional violation. *Id.* at 1071.

Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), *cert. den.*, 111 S.Ct. 2915 is, like *Rodriguez*, squarely on point. However, its holding is questionable because it does not deal with the primary issue in *Collins*, whether the particular parole procedure comes within the *Calder* categories. *Id.* at 1561. *Akins* assumes it does and cites *Rodriguez* for the point that the ex post facto clause is implicated when an opportunity for parole that existed prior to the alteration of the parole rules is eliminated. *Id.* at 1562. Finally, *Akins* cites *Marrero* as support for the proposition that parole

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[12] The same weaknesses in *Fender* are replicated in *U.S. v. Meeks*, 25 F.3d 1117, 1120 (2d Cir. 1994), a case which relies on *Fender* as precedent. *Meeks* baldly states that supervised release and parole are an integral part of the punishment for the underlying offense. *Id.* at 1121.

eligibility procedures are subject to ex post facto limitations. *Id.* at 1563. *Akins* was wrongly decided because it rests on overly broad interpretations of *Marrero* and *Rodriguez*.

Williams v. Bd. of Parole, 812 P.2d 443 (Ore. 1991) holds the same as *Flemming* with regard to a change in the state's calculation of sentence reduction. The 1991 opinion is rather cursory and the more trenchant superseding opinion is reported at 828 P.2d 465 (1992). However, the successor opinion is devoid of any discussion of *Calder* and is not of any greater value than *Flemming* on the particular point of law in question. In the second round, although the state properly pointed out that the Oregon Court of Appeals first had to consider whether the new rules were part of the law annexed to the offense when it was committed, i.e. that *Calder* categorization was the first step, the court simply stated that *Weaver* foreclosed the inquiry. *Williams* holds in imprecise fashion that:

> [A]n enactment that substantially alters the consequences attached to a completed crime changes the "quantum of punishment" and cannot be applied if it operates to a prisoner's detriment.

Id. at 466. The fact that such a statement could be made in 1992, two years after *Collins*, and in an opinion which does not cite to *Collins* at all, indicates how far courts have strayed from the plain and simple meaning of *Collins*.

These cases, in sum, evidence a fundamental failure to understand the main *Collins/Calder* analysis or to apply *Marrero* in a correct and limited fashion. In the field of

parole, therefore, this Court is faced with a plethora of cases which are overbroad and overintrusive into an area of fundamental state concern, the parole of inmates. Unless this Court takes firm action, the incorrect analysis contained in the principal cases will justify the wholesale revision of parole by the district courts.

CONCLUSION

The Ninth Circuit erred in this case in two ways. First, it substituted a supposition of harm for the showing of substantial detriment required by section 2241 and *Weaver*. Second, it has failed to follow the *Collins/Calder* analysis and has assumed that all parole procedures, no matter what their specific technical and legal context, are part of punishment, i.e. always within the third *Calder* category.

Either is a strong basis for reversal, but a review of the principal cases dealing with claims of ex post facto parole procedures evidences a confusion so great about basic principles that this Court should state the true meaning of *Marrero* as it applies to parole procedures. When *Collins* issued, it was conceivable that its main and concurring opinions could have existed in harmony with each other. The instant case and *Roller* clearly indicate that this conceivable harmony has not been achieved and

that this Court should indicate to its subordinate courts which analysis they must follow in the future.

Respectfully submitted,

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Dated: December 19, 1994

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE CITIZENS FOR LAW AND ORDER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the *Ex Post Facto* Clause apply to a rule of procedure that does not increase the punishment for crime simply because it would be adverse to the interests of some prisoners?

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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE CITIZENS FOR LAW AND ORDER IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Citizens for Law and Order (CLO) is a nonprofit corporation dedicated to encouraging law-abiding citizens to actively involve themselves in the support of law enforcement agencies and other organs of justice through educational, informational, and civic programs. CLO is committed to the principle that all citizens have a basic right to live in physical

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1. Both parties have given written consent to the filing of this brief.

safety and that victims of crime should be restored to a central position within the criminal justice system.

The present case involves an unwarranted expansion of the *Ex Post Facto* Clause into rules of procedure. This unwarranted interference with California law, if upheld, will waste precious resources in a criminal justice system that is already stretched to its limits. Even more importantly, upholding the decision below will force the victims of some of the worst crimes to needlessly relive their trauma. This waste and pain is contrary to the interests that CJLF and CLO were formed to advance.

SUMMARY OF FACTS AND CASE

In 1971 respondent was convicted of the first-degree murder of his girlfriend. When her body was found, it was discovered that her thumb had been cut off. Soon after being transferred to a halfway house in 1980, he married a woman who met him during his imprisonment. One month after his marriage, respondent was paroled. Morales' wife disappeared two months later. Except for one hand, her body has never been recovered. *Morales* v. *California Department of Corrections*, 16 F. 3d 1001, 1002 (CA9 1994).

Respondent plead *nolo contendere* to the second-degree murder of his wife, and was sentenced to 15 years to life imprisonment. *Ibid*. At the time he murdered his wife, all California prisoners were entitled to annual parole eligibility hearings once they were eligible for parole. A subsequent change in California law, Cal. Penal Code § 3041.5(b)(2)(B), allowed the parole board to defer the hearing up to three years if the prisoner's crime

involved multiple murders. 16 F. 3d, at 1003. Morales' earliest possible parole date was August 2, 1990. After finding Morales unfit for parole at that time, the California Board of Prison Terms set Morales' next eligibility hearing for three years later. *Id*., at 1002-1003.

Respondent challenged the delay in his parole hearing through federal habeas corpus. The District Court rejected his claim. See *id*., at 1003. The Ninth Circuit reversed, finding

that the retroactive application of the change in California law to Morales violated the *Ex Post Facto* Clause. *Id*., at 1006.

SUMMARY OF ARGUMENT

The *Ex Post Facto* Clause was designed by the Framers to enshrine the common law's disdain for *ex post facto* legislation into a constitutional prohibition. As explained in Justice Chase's opinion in *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386 (1798), this prohibition guarded against gross vindictive abuses of legislative power that resulted in retroactively expanding crimes, reducing defenses, or increasing punishments. The Clause was not, however, intended to prevent the retroactive application of changes in procedure.

The Clause was expanded beyond its common law roots, however, in *Kring* v. *Missouri*, 107 U. S. 221 (1883) and *Thompson* v. *Utah*, 170 U. S. 343 (1898) which allowed *ex post facto* attacks against changes in procedure that limited the substantial rights of defendant. Until recently, *Calder* and *Kring* formed parallel lines of reasoning in this Court's *ex post facto* cases. The uneasy truce between the two lines has allowed for dicta in several decisions that needlessly expanded the scope of the Clause.

The tension between the *Calder* and *Kring* lines was broken in *Collins* v. *Youngblood*, 497 U. S. 37 (1990), which overruled *Kring* and *Thompson*, returning the *Ex Post Facto* Clause to its common law roots. The renaissance of common law principles has led to the re-emergence of procedure in *ex post facto* analysis. Although procedure cannot be used as a mere label, those laws that may be fairly termed as procedural are exempt from the limits of the clause.

In addition to overruling *Kring* and *Thompson*, *Youngblood* also undercut the expansive dicta that relied on these two cases. While most of this Court's treatment of *Kring* and *Thompson* was innocuous, several cases, particularly *Weaver* v. *Graham*, 450 U. S. 24 (1981) and *Lindsey* v. *Washington*, 301 U. S. 397 (1937), deserve careful re-examination given their reliance on *Kring* and *Thompson*. Although none of these decisions need to

be overruled, a careful paring down of dicta is necessary to harmonize them with *Youngblood*.

In light of *Youngblood*, the fact that a change in the law is adverse to defendant and relates to punishment is no longer sufficient to invoke the *Ex Post Facto* Clause. Once again, the Clause affects only those laws that actually increase the punishment for crimes.

A change in law will increase the punishment for crime in one of four ways: adding a new punishment, increasing the type of punishment, increasing the effective level of punishment, or increasing the minimum or maximum indeterminate sentence.

The change in California's parole law does not fit into any of these four categories. It is not a vindictive abuse of legislative power, but is instead a scheduling rule designed to use California's resources more efficiently and minimize the trauma to victims of crime and their families. As it is best viewed as a rule of procedure, the change in California law does not violate the *Ex Post Facto* Clause.

ARGUMENT

I. *Collins* v. *Youngblood* re-established the substance versus procedure distinction as the primary issue in *Ex Post Facto* Clause cases.

The *Ex Post Facto* Clause[2] has the distinct advantage of having had a clear, common law meaning when the Constitution was written. See *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990). The original definition of an *ex post facto* law was:

2. "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U. S. Const. art. I, § 10, cl. 1. As the present case does not involve a federal prosecution, the similar restriction on Congress does not apply. See U. S. Const. art. I, § 9, cl. 3.

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*." *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386, 390 (1798) (opinion of Chase, J.) (emphasis in original); accord, *Youngblood*, *supra*, 497 U. S., at 41-42; *Dobbert* v. *Florida*, 432 U. S. 282, 292 (1977); *Beazell* v. *Ohio*, 269 U. S. 167, 169-170 (1925); *Fletcher* v. *Peck*, 6 Cranch (10 U. S.) 87, 138 (1810).

As the citations above testify, the common law definition of *Calder* has always been accorded respect. Unfortunately, it has not always been followed. A series of cases evolved around the proposition that any change sufficiently detrimental to the defendant was *ex post facto* if retroactively applied, even if the law did not fit into any of the categories established by *Calder*. This needless expansion pushed the interpretation of the *Ex Post Facto* Clause away from its original emphasis on distinguishing between substantive and procedural changes, moving it towards an inquiry into whether the changed law caused *any* significant disadvantage to the defendant. See *Weaver* v. *Graham*, 450 U. S. 24, 29 (1981).

Youngblood reversed this trend. By re-establishing the roots of the *Ex Post Facto* Clause, *Youngblood* brings back to the forefront the substance/procedure dichotomy. It is no longer enough that the change in law disadvantaged defendant. If it can be fairly termed procedural, a change in the law may be applied retroactively without violating the *Ex Post Facto* Clause.

A. Historical Background.

1. Common law roots.

Since *Youngblood* has returned the *Ex Post Facto* Clause to its common law roots, any interpretation of the Clause must start with the source of its common law meaning, Justice Chase's

opinion in *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386 (1798). The *Calder* Court saw the *Ex Post Facto* Clause as a reaction to Parliament's tendency to act as both legislature and court when pursuing its enemies. The problem was when Parliament, through "bills of attainder, or bills of pains and penalties" would attack its enemies "by declaring acts to be treason, which were not treason, when committed" changing the rules of evidence "to supply a deficiency of legal proof," punishing what had previously been unpunished, or by inflicting "greater punishments, than the law annexed to the offense." *Id.*, at 389 (opinion of Chase, J.) The reason given by Parliament for these acts was "that the safety of the kingdom depended upon the death, or other punishment of the (allegedly traitorous) offender . . . ." *Ibid.* As Justice Chase noted, this masked Parliament's real, darker motive. "With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice." *Ibid.*

It was incompatible with the basic notions of republican government to grant this vindictive power to any legislature. See *id.*, at 388-389. Yet there were limits to the reach of the Clause. The prohibition against *ex post facto* was centered over the legislatures' extensive powers to define and punish unlawful conduct. Although the state legislatures' primacy in substantive criminal law was unquestioned, "they [the legislatures] cannot change innocence into guilt; or punish innocence as a crime . . . ." *Id.*, at 388. But the states had even greater freedom in procedural matters. "The establishing courts of justice, . . . the appointment of judges, *and the making of regulations for the administration of justice*, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province, and duty of the state legislatures." *Id.*, at 387 (emphasis added).

The fact that legislation applied retroactively was not enough to violate the *ex post facto* principles. Only statutes that increased the harshness of the substantive criminal law could not be applied retroactively. See *id.*, at 391. The *Ex Post Facto* Clause was not concerned with micromanaging changes in state procedure. It was meant to prevent the gross, vindictive abuses of legislative power that visit necessarily unforeseen consequences on the innocent actor. See 1 W. Blackstone, Commen-

taries 46 (1st ed. 1765); *Calder*, 3 Dall., at 391 ("The celebrated and judicious Sir William Blackstone, in his commentaries, considers an *ex post facto* law precisely in the same light I have done").

2. *Parallel development.*

Although this Court's decisions have always respected the common law principles of *Calder*, see *ante*, at 5, a parallel line of reasoning developed that provided an alternative means for finding *ex post facto* violations. In *Kring* v. *Missouri*, 107 U. S. 221 (1883), the Court chose to depart from the common law roots of *Calder*. Under the expansive interpretation given by *Kring*, state procedures were no longer exempt from the Clause. Keeping procedural matters from the reach of *ex post facto* would destroy "the value of the constitutional provision . . . ." *Id.*, at 232. It would keep changes "with regard to bail, to indictments, to grand juries, to the trial jury" immune from the reach of the Clause, denying substantial rights given to "the defendant at the time to which his guilt relates . . . ." *Id.*, at 232. The *Ex Post Facto* Clause had to be protected to expand these important procedural rights. So the *Kring* Court expanded the Clause's scope, finding that a law that " 'alters the situation of a party to his disadvantage' is an *ex post facto* law . . . ." *Id.*, at 235 (quoting *United States* v. *Hall*, 26 F. Cas. 84, 86 (D. Pa. 1809) (No. 15,285)). This rationale was subsequently used to strike down the retroactive application of a procedural rule that decreased the size of juries in criminal cases. See *Thompson* v. *Utah*, 170 U. S. 343, 352-353 (1898).

While this Court expanded the *Ex Post Facto* Clause beyond its common law roots, it was still paying heed to Justice Chase's opinion in *Calder*. In *Hopt* v. *Utah*, 110 U. S. 574 (1884), a change in the law making felons competent to testify, see *id.*, at 587-588, was found not to be *ex post facto* because the changed rule was procedural. Since it did not come within one of the categories first announced in *Calder*, compare *id.*, at 590, with *Calder*, *supra*, 3 Dall., at 390, the change "relate[s] to modes of procedure only, in which no one may be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure." *Hopt*, *supra*, 110 U. S., at 590.

These two schools of thought, the procedural, common law-based analysis found in *Calder* and *Hopt*, and the expansive, substantial right analysis found in *Kring* and *Thompson*, took parallel paths through this Court's *ex post facto* decisions. In spite of the potential for conflict, this Court did not resolve the tensions between these two lines until *Youngblood*. See *post*, at 11-12. Thus, *Hopt*, which dismisses defendant's claim as procedural, still cites with approval the analysis of the *Kring* decision, a case that condemned procedure-based limits to the *Ex Post Facto* Clause. See *id.*, at 588-589; *Kring*, *supra*, 107 U. S., at 232.

This type of accommodation, judicial slaloming between the poles of *Calder* and *Kring*, became this Court's basic method of analyzing the *Ex Post Facto* Clause. See, *e.g.*, *Duncan* v. *Missouri*, 152 U. S. 377, 382-383 (1894); *Malloy* v. *South Carolina*, 237 U. S. 180, 183-184 (1915); *Beazell* v. *Ohio*, 269 U. S. 167, 171 (1925); *Dobbert* v. *Florida*, 432 U. S. 282, 293 (1977). Sadly, this finesse only caused confusion in the lower courts. See *Collins* v. *Youngblood*, 497 U. S. 37, 45 (1990).

The dissonance between *Calder* and *Kring* grew even louder in three of this Court's most recent decisions involving violations of the Clause. These cases, *Lindsey* v. *Washington*, 301 U. S. 397 (1937), *Weaver* v. *Graham*, 450 U. S. 24 (1981), and *Miller* v. *Florida*, 482 U. S. 423 (1987), each involved one of the most difficult issues under the Clause—when did a law actually increase the punishment for a crime. See 1 W. La Fave & A. Scott, Substantive Criminal Law § 2.4(a), at 136 (1986). The difficulty of these cases led this Court to derive dicta from the principles of *Kring* in order to buttress the results it reached.

Lindsey, which will be discussed in greater detail later, see *post*, at 23-24, involved a very complex change in sentencing law that replaced the old indeterminate sentencing scheme with a new system where a determinate sentence was set by the parole board. See 301 U. S., at 398-399. Although it could and effectively did conclude that this new system increased the punishment for crime, see *id.*, at 401; *post*, at 23-24, the *Lindsey* Court chose to go further. Relying on *Kring*, *Lindsey* also stated that "we need not inquire whether this [change] is technically an increase in the punishment" since it was to defendant's "substantial disadvantage . . . ." *Id.*, at 401-402. Given the fact that

defendants were incarcerated longer because of the change, this assertion was unnecessary to the final decision.

The move towards *Kring* was strongest in *Weaver*. *Weaver* involved several changes in the calculation of gain-time credits that reduced the time spent in prison. 450 U. S., at 25-26. While *Weaver* did find that these changes violated the common law principles of the Clause by increasing the punishment for crimes, see *post*, at 19-21, *Weaver* also engaged in a subtle and significant expansion of the *Ex Post Facto* Clause.

The *Weaver* Court asserted that "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. *Dobbert* v. *Florida*, 432 U. S. 282, 298 (1977); *Kring* v. *Missouri*, 107 U. S. 221, 229 (1883); *Calder* v. *Bull*, *supra*, at 387." *Weaver*, *supra*, 450 U. S., at 28-29. This statement seeks to prove more than it can. The common law rationale behind the Clause was meant to give individuals fair warning of the legality of their acts. See 1 W. Blackstone, Commentaries 46 (1st ed. 1765). It is also fair to infer that fair warning of the legality of an act also includes fair warning of the consequences of the act. Thus, as *Dobbert* notes, the *Ex Post Facto* Clause does require fair notice of the actual punishment accorded to a crime. *Dobbert*, *supra*, 432 U. S., at 298.

The problem with *Weaver* is that it did not stop there. It did not qualify its mandate of fair warning. *Weaver* therefore implicitly requires warning of the effect of *all* "legislative Acts." None of the cases cited by *Weaver* can support this proposition. As noted above, *Dobbert* simply states that individuals must be given fair warning of the penalty for a crime. The page of *Calder* cited by *Weaver* does not address the issue of fair warning. It only contains a discussion of the facts, a recitation of the broad powers of state legislatures, and the importance of the issues of legislative overruling of court decisions. See *Calder*, *supra*, 3 Dall., at 387. The only support for *Weaver*'s sweeping assertion comes from a single unattributed statement from *Kring*, the case that broke from *Calder*, that the purpose of the Framers of the Clause was "to protect the individual rights of life and liberty against hostile retrospective legislation." *Kring*, *supra*, 107 U. S., at 229.

The importance of *Weaver*'s assertion is shown by the broad test of unconstitutionality it established:

> "In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.[12]

"[12] We have also held that no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.' *Hopt* v. *Utah*, 110 U. S. 574, 590 (1884). See *Dobbert* v. *Florida*, 432 U. S. 282, 293 (1977). Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. *Thompson* v. *Utah*, 170 U. S. 343, 354-355 (1898), *Kring* v. *Missouri*, *supra*, at 232." 450 U. S., at 29 (footnote 11 omitted).

This completed the break with *Calder*. The procedure question was irrelevant,and the *Ex Post Facto* Clause guaranteed to defendant immunity from any significant threat of retroactive legislation. It did not matter if the legislation neither expanded criminal liability nor increased punishment. *Any* "legislative Act" that "disadvantage[d] the offender affected by it" violated the *Ex Post Facto* Clause. *Kring* and *Thompson* were established as the foundations of analysis under the Clause.

Miller v. *Florida*, *supra*, reflected the importance of *Weaver*. *Miller* involved a change in Florida's sentencing guidelines which caused offenders such as Miller to be given a higher presumptive sentence than before the change. 482 U. S., at 424. The *Miller* Court recognized the importance of *Calder*, reciting Justice Chase's four categories, see *id.*, at 429, but *Miller* also cited with approval *Weaver*'s expansive view of the intent of the Framers of the Clause. *Id.*, at 430. It noted the "disadvantage the offender" language of *Weaver*, while at the same time recognizing that procedural changes that do not alter " 'substantial personal rights' " were not *ex post facto*. *Id.*, at 430 (quoting *Dobbert*, *supra*, 432 U. S., at 293).

Miller was, in many ways, the typical *ex post facto* case before *Youngblood*. It pays homage to the common law origins of the *Ex Post Facto* Clause that were first expounded in *Calder* yet it contains language derived from *Kring* and *Thompson*, cases that expanded the Clause beyond its original intent. In the end, however, because the change in law actually increased the punishment of the crime, it was unnecessary to expand the Clause beyond its common law meaning in order to rule in favor of defendant. See *id.*, at 435. Thus *Calder* and *Kring* continued to run their parallel courses through the *Ex Post Facto* Clause.

B. Youngblood.

The parallel development of the *Ex Post Facto* Clause was shattered in this Court's most recent interpretation of the Clause, *Collins* v. *Youngblood*, 497 U. S. 37 (1990). For the first time since *Thompson* v. *Utah*, 170 U. S. 343 (1898), this Court had to decide whether a purely procedural change in the law could violate the *Ex Post Facto* Clause. See 497 U. S., at 44. The *Youngblood* Court rejected the notion that such a change could be *ex post facto*, placing the Clause firmly back on its common law foundation.

In order to reject this challenge, *Youngblood* had to confront and dispose of the expansion of the *Ex Post Facto* Clause in *Kring* and *Thompson*. It recognized that prior decisions such as *Beazell* v. *Ohio*, 269 U. S. 167 (1925) and *Duncan* v. *Missouri*, 152 U. S. 377 (1894) did seem to intimate that there was a "substantial protection" exception to the rule that procedural changes did not violate the Clause. See 497 U. S., at 45-46. But it also noted that "this language from the cases cited has imported confusion into the interpretation of the *Ex Post Facto* Clause." *Id.*, at 45. Instead of recognizing a broad, "substantial protection" exception to the procedure rule, *Youngblood* reduced these statements to their common sense minimum.

> "We think the best way to make sense out of this discussion in the cases is to say that by simply *labeling* a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto Clause*." *Id.*, at 46 (emphasis added). This interpretation simply reflects a very basic rule of law. "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934). A

court must examine what the law actually does, as opposed to what it is called by others. Thus, if Congress were to increase the penalty for bank robbery by amending one of the Federal Rules of Criminal Procedure, this procedural label would not immunize the change from the *Ex Post Facto* Clause.

On the other hand, if a changed law truly is procedural, then it can be retroactively applied without violating the Clause. Only changes in substantive criminal law—changes in the definition or punishment of crimes as defined by *Calder*—were subject to the *Ex Post Facto* Clause. 497 U. S., at 46. *Youngblood* thus reasserted the importance of procedure in *ex post facto* analysis. The only exception to procedure's immunity from the Clause, the "altered the situation to his disadvantage" rule of *Kring* and *Thompson*, was an unjustified expansion of the Clause beyond its original understanding. *Id.*, at 49. Therefore, these cases had to be overruled, *id.*, at 50-52, returning the Clause to its common law roots.

Youngblood is more important than the simple removal of *Kring* and *Thompson* from the case law. These overruled decisions had an important impact on this Court's interpretation of the Clause, justifying needlessly expansive dicta in several of this Court's cases. See *ante*, at 8-11. Removing the residue of *Kring* and *Thompson* from this Court's decisions will complete the *Youngblood* Court's task of clarifying the *Ex Post Facto* Clause.

C. Youngblood's Impact.

The *Youngblood* Court noted that none of this Court's decisions followed the reasoning of *Kring* v. *Missouri*, 107 U. S. 221 (1883) and *Thompson* v. *Utah*, 170 U. S. 343 (1898). *Collins* v. *Youngblood*, 497 U. S. 37, 47 (1990). This reflects the fact that this Court never had to rely upon *Kring* or *Thompson* as a rule of decision. Whenever this Court found a violation of the Clause, there were sound common law reasons for ruling in defendant's favor. See *ante*, at 8-11. This does not, however, mean that *Kring* and *Thompson* had no influence in this Court's decisions. Their influence in dicta was significant, see *ante*, at 8-11, and this influence must be removed in order to complete the overruling of *Kring* and *Thompson*.

The most vivid examples of the influence of *Kring* and *Thompson* are found in *Weaver* v. *Graham*, 450 U. S. 24 (1981). As noted earlier, *Weaver* relied upon *Kring* and *Thompson* to support dicta that would substantially expand the scope of the *Ex Post Facto* Clause. See *ante*, at 10. Perhaps the most dangerous statement to come out of *Weaver* is its test for examining *ex post facto* claims, that for a statute to be *ex post facto* "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must *disadvantage the offender affected by it.*" 450 U. S., at 29 (emphasis added) (footnotes omitted). This assertion was heavily dependent upon *Kring*'s and *Thompson*'s expansion of the *Ex Post Facto* Clause. See *ante*, at 9-10. *Youngblood*'s overruling of *Kring* and *Thompson* means that the sweeping scope of the *Weaver* dicta is no longer valid authority.

Once the references to *Kring* and *Thompson* are removed, the *Weaver* dicta becomes a valid statement of the *Ex Post Facto* Clause's reach, preventing the retroactive application of statutes that " 'increase the punishment [or] change the ingredients of the offense or the ultimate facts necessary to establish guilt.' " 450 U. S., at 29, n. 12 (quoting *Hopt* v. *Utah*, 110 U. S. 574, 590 (1884)). The problem with *Weaver* is that this crucial qualifying statement is buried in a footnote. By itself, the "disadvantage the offender" language found in the text is much too broad in light of *Youngblood*. In order for a court, prosecutor, or legislator to make an accurate assessment of the law after *Youngblood*, an individual must read the statement in light of the first half of footnote twelve, but must disregard the latter half of the footnote. A much better solution is to disregard the *Weaver* test. To the extent that it reflects Justice Chase's test in *Calder*, it is redundant. The remainder of *Weaver* that goes beyond *Calder* is both inaccurate and confusing.

Weaver's potential to confuse is demonstrated in the present case, where the Ninth Circuit dismissed California's procedural argument with the following unadorned statement: "However, a law that violates the core concerns of the *ex post facto* clause 'is not merely procedural, even if the statute takes a procedural form. *Weaver*, 450 U. S., at 29, n. 12 . . . .' " *Morales* v. *California Department of Corrections*, 16 F. 3d 1001, 1004 (CA9 1994).

The Ninth Circuit fails to note that the two cases cited by *Weaver* to support this proposition were the now-overruled *Kring* and *Thompson*. See *ante*, at 10, *Weaver*, *supra*, 450 U. S., at 29, n. 12. Furthermore, this "procedural form" notion has now been carefully circumscribed by *Youngblood* to mean no more than that the simple labelling of something as procedural is irrelevant. See *ante*, at 11-12. While careful analysis could lead a court to the right result using this *Weaver* language, the Ninth Circuit does not make the careful examination that is needed to interpret *Weaver* properly. See *post*, at 27-28. *Weaver* needs to be explained again in order to avoid similar mistakes in the future.

"Disadvantage the offender" has the additional problem of focusing too much upon the defendant's adversity. Adversity to defendant is not by itself enough to justify imposing the *Ex Post Facto* Clause, even if the adverse legislation relates to guilt or punishment. Thus reducing the number of jurors, which can be adverse to defendant's interest in avoiding a guilty verdict[3], no longer violates the Clause. *Youngblood*, *supra*, 497 U. S., at 51-52. What only matters now is whether a statute

> "[p]unishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." *Id.*, at 42 (quoting *Beazell* v. *Ohio*, 269 U. S. 167, 169-170 (1925)).

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3. In *Williams* v. *Florida*, 399 U. S. 78 (1970), this Court found that a reduction in jury size from twelve to six members was not so clearly disadvantageous to defendant as to be unconstitutional. On the other hand, the *Williams* Court did recognize that there were times that a sufficiently great reduction in jury size could appreciably reduce defendant's chance of getting a hung jury. *Id.*, at 101, n. 47. While the reduction in jury size condemned in *Thompson* may not have been adverse to defendant's interest in avoiding a guilty verdict, after *Youngblood*, even greater changes in jury size, which would increase the likelihood of guilty verdicts, would not be subject to *ex post facto* limitations.

The fact that an act can disadvantage defendant with regards to guilt or penalty and not implicate the *Ex Post Facto* Clause involves a subtle distinction that this Court should make explicit. While doing so, this Court should disapprove the confusing "disadvantage the offender" language in *Weaver* that relied upon the overruled *Kring* and *Thompson* decisions.

For similar reasons, this Court should also recognize the diminished authority of *Weaver*'s statement that "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." 450 U. S., at 28-29. To the extent that it refers to expanding the scope of crir . or the level of punishment, it is an accurate statement of the Framers intent to reproduce the common law. See *ante*, at 6-7. But the broader, literal reading, that any type of "legislative Acts" must give fair warning was not within the intent of the Framers. The only plausible authority for *Weaver*'s assertion, *Kring*, is now overruled. See *Collins*, *supra*, 497 U. S., at 50. This unwarranted extension of history should be disapproved. The primary purpose behind the Clause was to prevent legislative vindictiveness, see *ante*, at 6, and this Court once again recognizes this.

This does not, however, require the overruling of *Weaver*. The changes in Florida law did retroactively increase the punishment for crimes, a violation of the *Calder* principles. See *post*, at 19-21. Disapproving the two offending phrases does no more than harmonize *Weaver* with the changes initiated by *Youngblood*.

This Court's other *Ex Post Facto* Clause cases require less extensive adjustment. *Miller* v. *Florida*, 482 U. S. 423 (1987), although it restated the *Weaver* dicta, was decided according to the principles of *Calder*. See *ante*, at 10-11. Once the *Weaver* dicta is disapproved, *Miller* is consistent with *Youngblood*.

The influence of *Kring* in the other decisions was to cause this Court to recite *Kring*'s "substantial protection" theme. See *ante*, at 8-9. Since this aspect of *Kring* was overruled in *Youngblood*, it follows that subsequent restatements of the *Kring* holding are equally invalid. A statement to that effect in the present case would clear any confusion caused by *Youngblood*'s assertion that no case had ever followed *Kring* or *Thompson*.

See 497 U. S., at 47. Finally, the statement in *Lindsey* v. *Washington*, 301 U. S. 397 (1937), that it was not necessary to examine whether defendant was punished more severely if a charge was to his "substantial disadvantage," *id.*, at 401, must be cut back. Only changes in law that punish a person more severely actually violate the Clause.

The most important effect of *Youngblood* is the re-emergence of procedure as a primary issue in *Ex Post Facto* Clause analysis. While procedure can be used as a label, see *id.*, at 46; *Gibson* v. *Mississippi*, 162 U. S. 565, 590 (1896), it has a distinct meaning that is most relevant to the interpretation of the *Ex Post Facto* Clause.

Substance and procedure are well-defined, mutually exclusive aspects of the law. Substance is "[t]hat part of the law which creates, defines, and regulates rights and duties of parties . . . ." Black's Law Dictionary 1429 (6th ed. 1991). As it applies to criminal law, substance refers to declaring "what conduct is criminal and prescribes the punishment to be imposed for such conduct." 1 La Fave & Scott, *supra*, § 1.2, at 8. This is essentially the type of legislation that cannot be imposed retroactively under the common law principles revived in *Youngblood*. See 497 U. S., at 52.

Procedure, on the other hand, is the antithesis of substantive law, the "method of enforcing the rights or obtaining redress for their invasion." Black's Law Dictionary, *supra*, at 1429. Thus criminal procedure is "concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of the punishment." 1 La Fave & Scott, *supra*, § 1.1, at 2.

After *Youngblood*, these procedural matters are no longer subject to the limits of the *Ex Post Facto* Clause.[4] The only impediment to removing procedural matters from the Clause was

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4. Professor La Fave lists a third area of criminal law that is separate from substance or procedure, the administration of criminal justice. *Ibid.* This field, which includes such matters as "police organization and administration . . . prison administration, and administration of probation and parole," see *ibid.* (footnotes omitted), would also be considered procedural for the purpose of interpreting the *Ex Post Facto* Clause.

the "substantial protection" language of *Kring*, see *ante*, at 7. *Youngblood*, by overruling *Kring* and *Thompson*, eliminated the sole roadblock to immunizing procedural changes from judicial interference.

Although procedure is important, it is not the ultimate issue in *Ex Post Facto* Clause analysis. Cases will turn on whether a change in law expanded crimes, reduced defenses, or increased punishment. See *Youngblood*, *supra*, 497 U. S., at 52. But in close cases, whether a law is best considered substantive or procedural, can be decisively important. Therefore, procedure counts once again.

II. A change regarding the punishment does not violate the *Ex Post Facto* Clause unless it adds a new punishment, or increases the type of punishment, the effective level of punishment, or the minimum or maximum indeterminate sentence.

Of the various aspects of substantive criminal law covered by the *Ex Post Facto* Clause, changes relating to punishment create the most analytical problems. See *ante*, at 8. This comes as no surprise given the enormous growth and complexity of the law of sentencing. Punishment under the common law system in effect at the origin of the *Ex Post Facto* Clause was relatively a straightforward affair. Many crimes were capital, see 4 W. Blackstone, Commentaries 18 (1st ed. 1769), other punishments, while varied and often quite cruel, were well established and readily ascertained. See *id.*, at 370-371.

Punishment has become more complex in the subsequent two centuries. Indeterminate sentencing, probation, parole, aggravating factors, mitigating factors, special circumstances, and sentencing guidelines are just some of the innovations that have turned punishment of crimes into one of the most complicated areas of the law. Fitting this body of law to the common law principles established in *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386 (1798) can tax even the most able courts in close cases.

Although difficult, it is by no means impossible to determine when a statute increases the punishment for a crime. As the law of punishment has evolved, this Court has dealt with the

increased scope and complexity of punishment in its *Ex Post Facto* Clause cases. Harmonizing this Court's "accretion of case law," *Dobbert* v. *Florida*, 432 U. S. 282, 292 (1977), with the common law principles of *Calder*, will provide the lower courts with a clear, relatively concise guide to when punishment statutes violate the *Ex Post Facto* Clause.

The best way to organize this Court's *ex post facto* punishment cases is to break them down into the common ways that punishment has been increased. These categories will provide the lower courts with the necessary guidance to determine when a change actually makes the substantive criminal law more punitive.

A. Adding New Punishment.

Perhaps the most straightforward example of an *ex post facto* punishment is the statutory change that creates a new, additional punishment while retaining the old, such as a statute adding a fine to what had previously been just a term of imprisonment. As a matter of logic, if a statute retains an old punishment while adding a new one it must increase the punishment for the crime.

An example of this type of statute is found in *In re Medley*, 134 U. S. 160 (1890). In this case the old statute affixed the death penalty to defendant's crime, first-degree murder. See *id.*, at 167. The new statute added the requirement that the time a defendant served before execution must be spent in solitary confinement. *Id.*, at 163-164. Although it would appear to be difficult to increase a penalty set at death, *Medley* demonstrates that any added penalty violates the *Ex Post Facto* Clause. Since solitary confinement would make the time before defendant's execution worse than it previously was, see *id.*, at 170, the change in the law "was an additional law of the most important and painful character, and is, therefore, forbidden by" the *Ex Post Facto* Clause. *Id.*, at 171. If a punishment added to the death penalty can violate the Clause, then any other instance of added punishment must also violate the Clause.

B. More Severe Form.

This type of *Ex Post Facto* Clause violation is more theoretical than practical. The various punishments a legislature may constitutionally impose as penalties for crime can be arranged on a spectrum from most to least severe. A formal warning would be the least severe penalty, followed by a fine, then probation, then imprisonment, with the death penalty being the most severe. A statute that substituted a more severe form of punishment for a lesser penalty would violate the *Ex Post Facto* Clause. Therefore, a legislature could not retroactively change the punishment for littering from a simple fine to a term in prison. Since this is so obviously a violation of the Clause, lower courts and legislatures never violate it. Thus, this Court has not dealt with this type of violation. Nonetheless, this type of change violates the Clause, and any comprehensive definition should include this type of heightened punishment.

C. Increased Effective Level.

The *Ex Post Facto* Clause prohibits more than the retroactive application of different types of punishment. The Clause also prohibits taking the same type of punishment to a higher level. Thus a legislature may not retroactively change the punishment for burglary from six to eight years imprisonment. This is an increase in the "quantum of punishment" and therefore is contrary to the *Ex Post Facto* Clause. See *Dobbert* v. *Florida*, 432 U. S. 282, 294 (1977).

Unfortunately, changes in sentencing law are not always this straightforward. Two of this Court's most recent *Ex Post Facto* Clause cases show how difficult it can be to determine when the level of punishment is increased. Concentrating on the effective level of punishment imposed alleviates the difficulties encountered by cases like *Weaver* v. *Graham*, 450 U. S. 24 (1981), where defendants are usually, but not necessarily, punished more severely by a change in the law.

As noted earlier, *Weaver* involved a change in Florida law reducing the amount of gain time credits automatically accrued by prisoners who committed disciplinary infractions while providing for extra discretionary good time based on other factors. See *id.*, at 26-27, 34, n. 18. The difficulty raised by

this change in the law was the relationship between the gain time credits and the defendant's sentence. As Florida noted, the credits were "no part of the original sentence and thus no part of the punishment annexed to the crime at the time petitioner was sentenced." *Id.*, at 31 (internal quotations omitted). Furthermore, as the Florida Supreme Court pointed out, " 'gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied.' " *Id.*, at 28 (quoting *Harris* v. *Wainwright*, 376 So. 2d 855, 856 (Fla. 1979). Thus, the changed statute did not directly increase the sentence given to defendant at the time of this sentence.

The way that *Weaver* dealt with these arguments is central to a comprehensive understanding of how sentences may be increased in violation of the *Ex Post Facto* Clause. Although the loss of gain time did not change the formal sentence, it effectively increased the time defendant would serve before being released. "[I]t is the effect, not the form of the law that determines whether it is *ex post facto*." *Weaver*, *supra*, 450 U. S., at 31 (footnote omitted). It was normal for prisoners to get their sentences reduced through gain time. An inmate was "*automatically* entitled to the monthly gain time for avoiding disciplinary infractions and performing his assigned tasks." *Id.*, at 35 (emphasis added). Thus, the change in the law effectively increased Weaver's sentence by lowering the virtually automatic accrual of good time. This increase in punishment violated the *Ex Post Facto* Clause. See *id.*, at 35-36.

Of equal analytical importance is the *Weaver* Court's treatment of the increased opportunity for discretionary gain time under the new law. If a change in the law ameliorates defendant's condition, then it may be imposed retroactively without violating the *Ex Post Facto* Clause. *Dobbert*, *supra*, 432 U. S., at 292. Therefore, if the increased opportunities for discretionary gain time canceled out the decreased opportunities for automatic gain time, there would be no *Ex Post Facto* Clause violation. The *Weaver* Court dismissed this possibility because of the subjective, ephemeral nature of discretionary gain time. "[T]he award of extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program." *Weaver*, *supra*, 450 U. S., at

35. Because the net effect of this change was so hypothetical, it could not be added to the sentencing calculus.

Miller v. *Florida*, *supra*, took the pragmatic approach of *Weaver* to a similarly tricky situation. The problem in *Miller* was that the change in law did not necessarily increase a defendant's sentence. Under Florida law, a series of sentencing guidelines created a presumptively correct sentence range. The sentencing judge could set a sentence within this range without any written explanation. Any departure from the guidelines, however, required a written explanation providing clear and convincing reasons for doing so. *Miller*, *supra*, 482 U. S., at 425-426. Subsequent changes in Florida law increased the number of "primary offense points" assigned to sex crimes by 20%. This had the effect of increasing the presumptive sentence range for sex offenders such as defendant. *Id.*, at 427.

The problem in *Miller* was that the new law did not change the statutory limits to the sentence. *Id.*, at 428. Because the changes only involved the calculation of a range of sentences the sentencing court could depart from, defendant could not "show definitively that he would have gotten a lesser sentence" under the old guidelines. *Id.*, at 432 (internal quotations omitted).

Once again, the effective sentence was key to finding an *Ex Post Facto* Clause violation. The presumptive sentence is a "high hurdle that must be cleared before [sentencing] discretion can be exercised, so that a sentencing judge may impose a departure sentence only after first finding 'clear and convincing reasons' that are 'credible,' 'proven beyond a reasonable doubt,' and 'not a . . . factor which has already been weighed in arriving at a presumptive sentence.' " *Id.*, at 435. Like the near automatic gain time credits in *Weaver*, receiving a sentence within the guidelines was the norm in *Miller*. The likelihood that most defendants would receive increased sentences meant that new law increased the punishment for crimes. Unlike a simple change in procedure, "[t]he 20% increase in points for sexual offenses . . . simply *inserts a larger number into the same equation*." *Id.*, at 433 (emphasis added). Thus the new guidelines did "increase the 'quantum of punishment' " and thus violated the *Ex Post Facto* Clause. *Id.*, at 434.

Weaver and *Miller* demonstrate that changes can increase punishment without changing the formal statutory sentence affixed to the crime. There must, however, be some certainty that the effective punishment actually is higher. As *Weaver*'s treatment of the discretionary gain time demonstrates, changes that have only a remote or speculative effect on the sentence cannot be included in the *Ex Post Facto* analysis. Relying on such conjecture would only increase the confusion surrounding the Clause that this Court sought to eliminate in *Youngblood*.

D. Increased Minimum or Maximum Sentence.

The cases that dealt with increased effective sentences both involved a fixed, determinate sentence. See *Weaver* v. *Graham*, 450 U. S. 24, 25, 26 (1981); *Miller* v. *Florida*, 482 U. S. 423, 426 (1987). Indeterminate sentencing, where the defendant is sentenced to a range of time in prison with an administrative body determining when to release the prisoner, see *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 732, 111 S. Ct. 2597, 2605-2606 (1991), involves different considerations. Because the length of the sentence is determined through administrative discretion, it is impossible to ascertain an effective sentence with the precision of the *Weaver* and *Miller* decisions.

Instead of attempting to guess how long a sentence defendant actually will serve, judicial resources are better spent examining whether changes in the law increase the minimum or maximum sentence. Under an indeterminate scheme, the minimum sentence is the nearest substitute that can be found for the effective sentences of *Weaver* and *Miller*. If a legislature increases the minimum sentence, then every defendant must serve more time before the possibility of being released. Since most defendants are likely to serve longer sentences as a result of this change, and none will have their sentences reduced, the situation is almost identical to the virtual certainty of an increased sentence found in *Weaver*. See *ante*, at 19-21.

An increased maximum sentence, although conceptually more complicated, should also be treated as violating the Clause. Since there is no guarantee how much of an indeterminate sentence a defendant will serve, it is uncertain that any defendant actually will be harmed by a higher maximum sentence. Nonetheless, the formal, statutory sentence is greater than it once

was. This makes the sentence defendant receives from the sentencing court worse than it would have been, even if an administrative authority may exercise its discretion to release defendant at an earlier date. Such discretionary authority is too uncertain to be entered into the sentencing calculus. See *Weaver*, *supra*, 450 U. S., at 35.

Focusing on the minimum and maximum indeterminate sentences is the best way to explain *Lindsey* v. *Washington*, 301 U. S. 397 (1937), this Court's most complex *Ex Post Facto* Clause case. The old Washington law described a classical indeterminate sentencing scheme, where the trial court sentenced defendant to a minimum and maximum sentence within the statutory range for the offense. Once defendant served the minimum sentence, the parole board had discretion to parole him. *Id.*, at 398. The new sentencing law required the trial court to sentence defendants to the statutory maximum for his crime. The parole board, however, was to set the actual, fixed term of years that defendant had to serve, provided that term did not exceed the statutory maximum. See *id.*, at 398-399.

The problem in *Lindsey* was that both schemes were so discretionary that it was impossible to determine if a defendant would necessarily spend more time in prison under the new scheme. See *id.*, at 399-400. Thus the Washington Supreme Court held that since the new law did not increase either the minimum or maximum statutory sentence for the crime, the change did not violate the *Ex Post Facto* Clause. *Ibid.*

The *Lindsey* Court got around this problem by examining the minimum sentence defendant must serve before being free of state control.

> "The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor." *Id.*, at 400-401.

Under the old law, defendant's minimum sentence before he was free from state control was the statutory minimum sentence. See *id.*, at 398. Therefore, the mandatory added parole term made the minimum sentence under the new statute more onerous than it was before the change. The change made "the maximum compulsory." *Id.*, at 401. This increase in the minimum sentence defendant was entitled to under the prior indeterminate scheme violated the *Ex Post Facto* Clause.

The four categories listed in this section should provide a comprehensive list of the way a penalty statute can violate the *Ex Post Facto* Clause. They deal with the substance of sentencing law—how long must defendant be imprisoned or what additional harms will be inflicted upon him. Anything outside of this core of sentencing law should be considered procedural and thus exempt from the Clause.

III. Because the change in California law only affected procedure, it may be retroactively applied to respondent without violating the *Ex Post Facto* Clause.

In deciding whether the change in California parole law that was applied to Respondent violated the *Ex Post Facto* Clause, it is important to consider what the changes actually accomplished. The fact that a statute is related to punishment and is adverse to defendant is not enough to implicate the *Ex Post Facto* Clause. See *ante*, at 14-15. Instead, this Court will go behind the formalities and examine the actual punitive effect of a change in the law,[5] See *Miller* v. *Florida*, 482 U. S. 423, 433 (1987). The only effect of the change in California law is to increase the time between parole eligibility hearings for certain criminals. See Cal. Penal Code § 3041.5(b)(2)(B). This does not increase a defendant's punishment under any of the four categories mentioned in part II of this brief. Instead, it is best viewed as a change in procedure, not motivated by vindictive interests, but

5. Since the changed probation procedure examined in the present case has no effect at all on the definition of crimes or defenses, there is no reason to discuss those aspects of the *Ex Post Facto* Clause.

by compassion to the victims of crime and a desire to allocate California's scarce resources more efficiently.

The parole hearing change does not affect the first two categories listed in part II. The punishment for defendant's crime, second-degree murder, remains an indeterminate term of fifteen years to life after the change in parole law. See Cal. Penal Code § 190(a). Thus the change in law neither added a new punishment to the old, see part II A, *ante*, at 18, nor substituted a new, more severe type of punishment for the old punishment for second-degree murder. See part II B, *ante*, at 19.

Nor did the change in California law effectively increase defendant's prison sentence. The effective sentence analysis found in *Weaver* v. *Graham*, 450 U. S. 24 (1981) and *Miller*, *supra*, is not suited to analyze indeterminate sentencing schemes. *Weaver* and *Miller* determined that the new laws violated the *Ex Post Facto* law because it was virtually certain that the changes would lead to increased prison sentences. *Weaver*, *supra*, 450 U. S., at 35-36; *Miller*, *supra*, 482 U. S., at 433.

The possibility that some defendants may have their sentences increased as a result of the new California law is too speculative for *Ex Post Facto* Clause analysis. The decision to grant parole is vested in the guided discretion of an administrative agency, the Board of Prison terms. See Cal. Penal Code § 3041(a)-(b). Although the board must give written reasons related to the timing or gravity of the prisoner's current or past offenses, see *id.*, subd. (a), it is up to the board to "establish criteria for the setting of release date." *Id.*, subd. (a). There are simply no guarantees when defendant will be released. Thus the timing of parole hearings, like the discretionary gain time credits in *Weaver*, is too remote to influence the calculus of the *Ex Post Facto* Clause.

Nor does the change in parole law conflict with the fourth category by increasing Morales' minimum or maximum indeterminate sentence. See part II D, *ante*, at 22-24. Defendants are still entitled to the possibility of being paroled at the expiration of the minimum sentence. See Cal. Penal Code § 3041(a). As noted above, nothing in the new law changes respondent's minimum or maximum sentence. This is not a "revision of a

statute providing for a maximum and minimum punishment by making the maximum compulsory." *Lindsey*, *supra*, 301 U. S., at 401. It instead deals with certain procedures relevant to the necessarily vague middle of indeterminate sentences.

The primary purpose behind the *Ex Post Facto* Clause is to prevent legislative vindictiveness. See *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386, 388-389 (1798) (opinion of Chase, J.). The change in California law attacked by Morales has no punitive purpose. It is simply a new rule that gives the Board of Prison Terms more control of its scheduling. Allowing the Board of Prison Terms to act on the reality that some people are less amenable to immediate parole than others allows the Board to free up scarce resources. If it is extremely unlikely that a person will get parole in the near term, it makes more sense for the Board to devote its resources to those cases most worthy of its scarce resources of time and energy. A harried, overworked Board of Prison Terms may not be able to give each case the attention it deserves. Efficient application of its resources can only improve the quality of probation hearings. A prisoner has no legitimate interest in a strained, less accurate Board of Prison Terms. "No man has a legal right to have his case wrongly decided . . . ." 1 J. Wigmore, Evidence § 21, at 890 (Tillers rev. 1983). The efficiency and accuracy advanced by the new California law is not the legislative vindictiveness the *Ex Post Facto* Clause seeks to halt.

The change in parole law has an additional purpose that is even more benign. Parole eligibility hearings, particularly for multiple murderers such as Morales, can be very traumatic to the prisoner's victims and their families. As one woman, who was raped, beaten, strangled, set afire, and had her husband beaten to death said, " 'My life is fine until this issue [the parole hearing] comes up again, and then the pain and terror start over . . . .' " Popp, Bid to Deny Freedom for Killer, S. F. Chronicle, June 30, 1987, p. 4, col. 1 (quoting Annette Carlson). The families have a compelling interest in seeing that the killers of their loved ones are not set loose on society. Yet testifying at the eligibility hearing can only rekindle the pain of the murder. The change in California's parole law can spare the victims' families this annual trauma while preserving the prisoners' interest in the possibility of getting parole. Such

compassion is a far cry from the grossly vindictive abuses of Parliament that inspired the *Ex Post Facto* Clause.

Penal Code section 3041.5(b)(2)(B) is best viewed as a rule of procedure. It did not change, or even address, the actual term of years to be served by a convicted defendant. The change merely gave the Board of Prison terms more discretion in its scheduling of parole suitability hearings. Scheduling statutes like this are a quintessential part of criminal procedure, "the steps through which a criminal proceeding passes . . . ." 1 W. La Fave & A. Scott, Substantive Criminal Law, § 1.1, at 2 (1986). The change to section 3041.5(b)(2)(B) is therefore beyond the scope of the *Ex Post Facto* Clause.

In the case below, the Ninth Circuit did little more than simply assert that the change in parole law makes defendant's punishment more severe. It notes that the change in law "eliminate[s] the possibility of parole altogether in the period between the hearings." *Morales* v. *California Department of Corrections*, 16 F. 3d 1001, 1004 (CA9 1994). It dismisses the remoteness of Morales actually getting parole in the intervening years by stating that his "claim does not depend on being able to demonstrate that he would have received parole sooner if he were granted annual parole hearings." *Id.*, at 1005. The lower court then concludes that Morales' *ex post facto* rights were violated because California deprived him of " 'fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.' " *Ibid.* (quoting *Weaver*, *supra*, 405 U. S., at 30).

The essence of this emaciated argument is the notion that defendant does not have to show that his sentence is higher as a result of the change in law. This theory is derived from a statement in *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937). "But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed".[6] The *Lindsey* statement is too weak a reed to support

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6. The Ninth Circuit does not cite *Lindsey* to support its theory but instead cites one of its own cases, *Flemming* v. *Oregon Board of Parole*, 998 F. 2d 721 (CA9 1992). *Morales*, *supra*, 16 F. 3d, at 1005. However, *Flemming* is based on *Lindsey*. See *Flemming*, *supra*, 998 F. 3d, at 725.

the Ninth Circuit's assertion. In the first place, *Lindsey* involved a complex change of law that drastically increased the minimum punishment that defendant had been entitled to under the old indeterminate sentencing scheme. See *id.*, at 398-399. This is manifestly distinguishable from the present statute, which leaves defendant's minimum sentence untouched. More importantly, the "standards of punishment" arguments of *Lindsey* was dependent upon the now overruled "substantial right" holding of *Kring* v. *Missouri*, 107 U. S. 221 (1883). See *ante*, at 23-24. *Collins* v. *Youngblood*, 497 U. S. 37 (1990), by overruling *Kring*, eliminated whatever precedential value the *Lindsey* dicta had. Unfortunately, the specter of *Kring* lives on in the Ninth Circuit.[7] It is time for this Court to remove that ghost once and for all.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

November, 1994

Respectfully submitted,

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7. The continuing influence of *Kring* is also shown by the way the Ninth Circuit invoked the expansive, *Kring*-dependent dicta of *Weaver* to dismiss the argument that the change was only procedural. See *ante*, at 13-14.

No. 93-1462

In the

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CALIFORNIA DEPARTMENT
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, JUSTICE FOR MURDER VICTIMS, VICTIM'S PAROLE ASSISTANCE, VICTIMS AND FRIENDS UNITED, MEMORY OF VICTIMS EVERYWHERE, SAVE OUR FUTURE, AND LOVED ONES OF HOMICIDE VICTIMS IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF), Justice for Murder Victims, Victim's Parole Assistance, Victims and Friends United, Memory of

Victims Everywhere, Save Our Future, and Loved Ones of Homicide Victims respectfully submit this brief amicus curiae in support of petitioners, California Department of Corrections, *et al*. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Justice for Murder Victims, Victim's Parole Assistance, Victims and Friends United, Memory of Victims Everywhere, Save Our Future, and Loved Ones of Homicide Victims are all California based organizations whose membership consists of crime victims, their families, and other concerned citizens. The mission of these groups is to provide support services for crime victims and their families, to ensure that existing victims' rights laws are zealously enforced, and to encourage the drafting of new legislation to further protect the rights of crime victims and improve public safety.

Amici are submitting this brief because they believe their public policy perspective and extensive efforts in support of the rights of crime victims will provide an additional viewpoint with respect to the constitutional issues presented. In particular, this Court should be aware of the tremendous impact that holding annual parole eligibility hearings has on the families who attend those hearings.

Typically, the families of murder victims must begin the financially and emotionally draining process of preparing for a parole eligibility hearing five to six months in advance of the hearing date by circulating petitions and requesting letters in opposition to release from friends and relatives, local public safety groups, and members of crime victims groups. Additionally, budget shortfalls have forced many counties to stop sending Deputy District Attorneys to parole hearings to represent the people. In such cases, the next-of-kin, who generally have no legal background, are forced to represent not only their own interests but those of general public safety as well. Finally, the families of victims must absorb the expense of both travel to the often distant prisons where the hearings are held and work time lost for hearing preparation and attendance. When annual hearings are required, one hearing is barely over before preparation for the next must begin. Amici believe that the lower court's opinion creates an unwarranted extension of the ex post facto clause that poses a serious threat to a state's ability to make any procedural modifications to its parole system and condemns the families of crime victims to annually relive their personal tragedies while preparing for and attending pro forma hearings for inmates who are seeking parole.

The personal impact of these hearings upon the survivors of murder victims is graphically illustrated by the individual stories of Betty Carlson and Harriet Salarno, co-founders of Justice for Murder Victims. Next Spring, Mrs. Carlson, who is in her late sixties, will attend the ninth parole hearing for her son's murderer, Angelo Pavageau. Pavageau was found guilty of breaking into Frank Carlson's home, savagely beating Mr. Carlson to death with a claw hammer, chopping block, and glass vase and brutally raping, torturing, and setting afire his wife Annette. At his trial, Pavageau, who was a Black Panther, described himself as a political prisoner and attempted to justify his acts in terms of class warfare. Suddenly, at his 1991 parole hearing, Pavageau's story changed and he tried to explain the crime

by claiming that he was involved in a homosexual affair with Frank Carlson and was a jilted lover who was suffering temporary insanity. These unexpected allegations, which were completely unsupported by any evidence, caused tremendous pain to Frank's mother who feels as if it is her family who is on trial every year when Pavageau has his eligibility hearing. Mrs. Carlson is unable to escape the agony of these crimes against her family, because preparation for the annual hearings takes up approximately two-thirds of her life and never allows enough time for the pain to heal.

Harriet Salarno and her family have attended four parole hearings for Steven Burns who murdered her 18-year-old daughter, Catina. Burns, who had been Catina's boyfriend, shot her execution style when she tried to break off their relationship. After the murder, Burns returned to his dorm room where he observed Catina slowly bleeding to death from his window while calmly watching Monday Night Football. The Salarno family's participation in Burns' hearings is particularly important, because Burns has been a "model" prisoner in the institutional setting where he has been able to avoid conflict and may seem like a good candidate for parole. Psychiatric reports diagnose him with a personality disorder, but this disorder, which manifests in an inability to deal with conflict in a nonviolent manner, has not been graphically illustrated since his murder of Catina. Mrs. Salarno's husband, Mike, describes the impact of the hearings as devastating and feels that the emphasis on the rights of the criminals turns the victims' families into the prisoners when they are forced to return and relive the crime year after year.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Morales v. California Department of Corrections*, 16 F.3d 1001 (9th Cir. 1994).

STATEMENT OF THE CASE

In 1971, Jose Morales was convicted for the first-degree murder and mutilation of his girlfriend. After being transferred to a halfway house in April, 1980, he married a 75-year-old woman who had visited him in prison. Within two months of Morales' parole in May, his new wife had disappeared. Her body was never recovered, but one of her hands was discovered on the Hollywood Freeway three days after her family reported her missing. Morales pleaded no contest to the second degree murder of his wife and was sentenced to a term of 15 years to life in 1982. His earliest parole eligibility date was August 2, 1990.

On July 25, 1989, one year before Morales' earliest parole eligibility date, the Board of Prison Terms (BPT) conducted an initial parole consideration. At that time, Morales was found unsuitable for parole and his next hearing date was set for three years later. After the BPT's decision, Morales filed a petition for a writ of habeas corpus alleging that his rights under the ex post facto clause had been violated when his next hearing was deferred for three years and that he had wrongfully been denied parole.

Annual parole hearings are the norm under California's Determinate Sentencing Law (DSL), adopted in 1977, but California Penal Code § 3041.5(b)(2), as amended in 1981, gives the BPT the authority to defer parole hearings for multiple murderers for up to three years if the board determines that the prisoner will not become suitable for parole during the interim and submits a statement of findings

in support of that determination. Prior to 1977, criminals in California were sentenced under the Indeterminate Sentencing Law (ISL) which allowed the BPT to exercise similar discretion in deferring review of extreme cases.

The issue presented by this case is whether the BPT can defer parole hearings for felons who, like Morales, committed their crimes between 1977 and 1981 when the unamended DSL mandated annual review. In his petition for writ of habeas corpus, Morales argued that retrospective application of the 1981 amendment to defer his next parole eligibility hearing made his sentence more burdensome in violation of the ex post facto clause because it delayed the possibility of parole. The Department of Corrections defended the BPT's discretion as a mere procedural change that did not affect Morales' substantive rights.

The District Court denied Morales' petition. On appeal, the Ninth Circuit reversed holding that felons who committed their crimes between July 1, 1977, and December 30, 1981, under the unamended DSL, had received a punishment that included annual consideration for parole. The retroactive change allowing the BPT to consider multiple murderers for parole only once every three years eliminated the possibility of parole during the time between hearings and was thus found to make the sentences of these convicts more onerous in violation of the ex post facto clause. Therefore, the BPT was ordered to comply with the law as it existed at the time the crime was committed and grant Morales annual parole eligibility hearings. The Department of Corrections' petition for certiorari was granted by this Court on September 26, 1994.

SUMMARY OF ARGUMENT

The 1981 amendment to California Penal Code § 3041.5(b)(2) authorizing the Board of Prison Terms to defer parole eligibility hearings for up to three years for inmates convicted of multiple murders on a finding that the inmate will not be suitable for parole during the interim is a mere procedural change and does not violate the constitutional prohibition of ex post facto laws.

In order to establish an ex post facto violation, this Court has mandated that an offender must show both that the law is applied retroactively and that he is disadvantaged by its application. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Procedural changes which do not affect an offender's substantive rights or change the quantum of punishment received do not violate the ex post facto prohibition. In this case, there is no question that the statute has been applied retroactively, the issue before the Court is whether or not Morales was disadvantaged by its application. In order to establish an ex post facto violation based on a change in the frequency of parole hearings, amici believe that an inmate should be required to show a realistic likelihood that he could have been granted parole had a hearing been held. Absent such a showing, the punishment is unaffected by the amendment and the change is merely procedural.

The court below made no such finding that Morales had any reasonable likelihood of being granted parole if he had been granted annual hearings and instead based its holding solely on the assertion that any law changing the frequency of parole eligibility hearings automatically violates the ex post facto clause. On the contrary, California decisions interpreting this statute made specific findings that the statute was designed to defer hearings only for those inmates with no realistic possibility of parole and that the

procedural protections attendant to parole eligibility hearings prevent the possibility that an inmate who has any likelihood of being granted parole will have his hearing deferred. In fact, a finding that Morales would not be suitable for parole before his next hearing was required in order for the BPT to justify postponement. Without a showing that Morales was actually disadvantaged by application of the amendment by losing a realistic opportunity to be paroled the judgment below is clearly erroneous and must be reversed.

In addition to the legal issues, this Court should balance the minimal impact that deferred parole hearings have on inmates with the devastating economic and emotional impact that ordering annual hearings will have on the families of crime victims. In addition to the trauma inherent in reliving the loss of a loved one on an annual basis, budget shortfalls in communities throughout California have resulted in a situation where the family of a victim often ends up as the sole representative of both their own personal interests and those of their community. As a result, these families annually incur tremendous expenses for hearing preparation and travel to the often distant prisons where the hearings are held. For these reasons, amici urge this Court to draw a bright line defining both the point where postponement of a parole eligibility hearing violates the ex post facto clause and the degree of disadvantage that an inmate must show to establish such a violation.

ARGUMENT

I

IN ORDER TO VIOLATE THE EX POST FACTO CLAUSE, A LAW MUST BE RETROSPECTIVE IN APPLICATION AND DISADVANTAGE THE OFFENDER

The ex post facto clause of the United States Constitution prohibits both Congress and the States from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. at 28 (quoting *Cummings v. Missouri*, 4 Wall 277, 325-326 (1867)). In *Weaver*, this Court laid out the two prong test that must be satisfied to establish that a criminal or penal law is ex post facto: "[1] it must be retrospective, that is it must apply to events occurring before its enactment, and [2] it must disadvantage the offender affected by it." *Id.* at 29. The Court went on to note that there is no ex post facto violation if the change to the law "is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Id.* at 29 n.12 (quoting *Hopt v. Utah*, 110 U.S. 574, 590 (1884)).

A. The Statu y Amendment at Issue in This Case Is Being Applied Retrospectively

Both the court below (*Morales*, 16 F.3d at 1003) and the California courts which have reviewed Penal Code § 3041.5(b)(2) (*In re Jackson*, 39 Cal. 3d 464 (1985); *Morris v. Castro*, 166 Cal. App. 3d 33 (1985)) agree that the law in question is undoubtedly being applied retrospectively. In an ex post facto analysis, the court examines the state of

the law at the time the crime was committed, and in this case California law required annual parole eligibility hearings when Morales killed his wife in 1980. *Morales*, 16 F.3d at 1003. Consequently, the only issue to be resolved in this case is whether or not retrospective application of the law as amended giving the BPT discretion to postpone parole hearings violates the ex post facto clause or is merely a procedural change in the law that lacks constitutional implications.

B. In Order to Satisfy the Disadvantage Requirement the Offender Must Show a Change in the Quantum of Punishment Resulting from Application of the Challenged Law

1. A Procedural Change May Work to the Disadvantage of an Offender Without Violating the Ex Post Facto Clause as Long as It Does Not Infringe upon Substantial Personal Rights

In *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court stated that "[e]ven though it may work to disadvantage a defendant, a procedural change is not ex post facto." *Id.* at 293. Further guidance as to the meaning of a "procedural change" was provided by this Court in *Collins v. Youngblood*, 497 U.S. 37 (1990), where it held that a procedural change allowing reformation of improper jury verdicts did not violate ex post facto requirements because it did not change the definition of the crime or increase the punishment received. *Id.* at 44.

The *Collins* court explained that, even with regard to procedural changes, the purpose of the ex post facto prohibition was "to secure substantial personal rights against arbitrary and oppressive legislative action" but emphasized

that the clause was *not* meant "to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Id.* at 46. The Court made it clear that merely labeling a law "procedural" does not immunize it from ex post facto scrutiny. A court must look beyond the form to determine whether or not the change "make[s] innocent acts criminal, alter[s] the nature of the offense, or increase[s] the punishment." *Id.* Essentially, then, a procedural change is one that does not violate these basic concerns of the ex post facto clause.

In this case, therefore, the issue is whether or not application of the 1981 amendment to Penal Code § 3041.5(b)(2) increased Morales' punishment. As this Court put it in *Dobbert*, Morales must show that application of the law resulted in an actual change in the "quantum of punishment." *Dobbert*, 432 U.S. at 294.

2. The Case Law Is Unclear as to What Constitutes an Increase in Punishment Sufficient to Violate the Ex Post Facto Clause

Thus far, this Court has not laid out a specific level of disadvantage or increase in punishment that an offender must show to establish that a given law is ex post facto. As a starting point, however, this Court stated in *Weaver* that "a law need not impair a 'vested right' to violate the ex post facto prohibition." 450 U.S. at 29 (footnote omitted). The Court went on to explain:

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief

> under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

Id. at 30.

In other words, the primary purpose of the ex post facto clause is to insure that individuals have fair warning of the consequences of their actions and that they are able to rely on the legislative statement of those consequences until it is explicitly changed. *Id. at* 28. The key question then is not whether a prisoner's existing right to be released on a certain date is infringed by application of the new law, but whether the provision "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'" *Id.* at 33 (citation omitted).

Applying this standard, the *Weaver* Court held that a state statute which reduced an inmate's ability to earn automatic "gain time" credits based solely on good conduct constricted the inmate's ability to earn early release making the punishment more onerous for a crime committed before its enactment and thereby running afoul of the ex post facto prohibition. *Id. at* 36. Although the statute in *Weaver* did not impair a specific right to early release, the Court found sufficient disadvantage in that the inmate's opportunity to shorten his time in prison simply by following the prison rules and adequately performing his assigned tasks was reduced. *Id. at* 34. Under *Weaver*, then, while a prisoner need not conclusively show that application of a law will definitely make his sentence longer, he must at least establish that it results in the loss of a real opportunity for early release.

A series of cases in the Circuit Courts have attempted to further define the exact degree of disadvantage required to establish an ex post facto violation in the context of amendments to parole regulations. In *Rodriguez v. United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979), which was cited in *Weaver* (450 U.S. at 32), the court ruled that ex post facto was violated where retroactive application of a regulation denied a prisoner "any meaningful opportunity for parole." 594 F.2d at 176. In that case, the prisoner had been sentenced to a two-year term in federal prison and was immediately eligible for parole. *Id. at* 170. The regulations in place when the crime was committed called for an immediate eligibility hearing followed by a second hearing one-third of the way into the sentence, while the revised regulation mandated review every 18 months. *Id.* at 172. Based on findings that inmates were rarely given a parole date at the initial hearing but that parole dates were frequently awarded at hearings held one-third of the way into short sentences, the court found that retroactive application of the regulation placing review at 21 months into a 24-month sentence was clearly to the inmate's "substantial disadvantage" and precluded any "meaningful opportunity for parole." *Id. at* 175-76. Under the former regulation, the inmate had a realistic chance of getting a parole date eight months into his two year sentence. Application of the revised regulation eliminated that possibility.

More recently, the Eleventh Circuit extended the logic of *Rodriguez* to find an ex post facto violation where the amended regulation changed review from mandated annual hearings to a requirement that hearings be held at least every eight years. *Akins v. Snow*, 922 F.2d 1558, 1560 (11th Cir. 1991). In *Akins*, the court did not make any findings regarding the likelihood of parole being granted if hearings had been held. Instead, the court based its decision on the mere supposition that, since a prisoner can't get a parole date

without an eligibility hearing, altering the time period between hearings increases the time an inmate must spend in prison before he is eligible for parole. *Id.* at 1564. The court cited *Rodriguez* for support of this proposition:

> Eligibility in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing." [594 F.2d at 176.] ... *Rodriguez* implies that without the opportunity for a parole hearing an inmate is not, in any realistic meaning of the term, eligible for parole.

922 F.2d at 1562. Up to this point, this was a fair reading of the underlying logic of *Rodriguez*, but the *Akins* court took this statement completely out of its factual context when it went on to say:

> We realize that *Rodriguez* involved a change that effectively eliminated all opportunity for parole release, but we think the specific disadvantage is incidental. The key to the court's conclusion was that Rodriguez was deprived of an opportunity for parole that existed prior to the alteration of the parole rules.

Id. Thus *ipse dixit* the *Akins* court expanded the application of the ex post facto clause from a case where the court found that the prisoner had a reasonable expectation of parole if a hearing had been held to find an ex post facto violation on the mere supposition, unsupported by any findings, that more

frequent parole hearings *might* result in an opportunity for parole.

Such a bare supposition cannot possibly establish the loss of a real opportunity for early release as required by *Weaver*, but, in the past year, two more circuits, including the Ninth Circuit in the decision below, have cited this erroneous extension of *Rodriguez* as authority for holdings that amended parole laws allowing postponement of eligibility hearings for violent offenders for two to three years were ex post facto laws rather than mere procedural changes based solely on the unsupported assertion that the prisoner *might* have lost an opportunity for parole. *Roller v. Cavanaugh*, 984 F.2d 120, 123 (4th Cir.), *cert. granted*, __ U.S. __ 124 L. Ed 2d 635, *cert. dismissed*, 510 U.S. __, 126 L. Ed. 2d 409 (1993); *Morales*, 16 F.3d at 1004. This is surely the sort of holding warned against by the Ninth Circuit when it stated in another context that "[t]he *ex post facto clause* is not concerned with fiction." *Watson v. Estelle*, 886 F.2d 1093, 1096 (9th Cir. 1989).

Amici urge this Court to stop the Circuit Courts from relying on "fiction" by drawing a bright line defining the point at which, if ever, postponement of a parole eligibility hearing runs afoul of the prohibition against ex post facto laws and the degree of disadvantage that an inmate must prove to establish such a violation. A requirement that the inmate show a realistic possibility of being granted parole if a hearing had been held is in line with the goals of giving fair warning of penalties and restraining arbitrary or vindictive legislation. This would not require the inmate to prove impairment of a "vested right," but would simply require a showing of an actual lost opportunity rather than a mere supposition that having more eligibility hearings equates with increased possibilities of parole irrespective of the actual likelihood of release.

II

AMENDMENT OF A LAW GOVERNING THE FREQUENCY OF PAROLE ELIGIBILITY HEARINGS TO PERMIT POSTPONEMENT OF ANNUAL HEARINGS WITHIN THE DISCRETION OF THE BOARD IS A MERE PROCEDURAL CHANGE AND NOT AN EX POST FACTO LAW

In 1985, the California Court of Appeal held that both the amendment at issue in this case (authorizing the BPT to defer parole eligibility hearings for multiple murderers for up to three years on a finding that the prisoner is not reasonably likely to be found suitable for parole before the next hearing date) and the related 1982 amendment, which authorized the BPT to defer the next hearing for any prisoner for up to two years on the same finding, were merely procedural changes which neither increase punishment nor impair a substantial right. *Morris*, 166 Cal. App. 3d at 38. The same conclusion was reached by the California Supreme Court five months later as to the 1982 amendment. *Jackson*, 39 Cal. 3d at 472. Although the California Supreme Court did not pass judgment on the 1981 amendment, which was not at issue in the case, it noted that the appellate court's holding in *Morris* was consistent with its decision. *Id. at* 472 n.8.

While the court below was not bound by the California courts' determination, because the issue of "[w]hether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question" (*Weaver*, 450 U.S. at 25), the reasoning of the California cases is compelling. This is particularly so when contrasted with the conclusory statement of the court below:

> By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed. Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility. [Citing *Akins*, 922 F.2d at 1562.] Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause.

Morales, 16 F.3d at 1004. Not only did the court below fail to make any finding that Morales had any reasonable likelihood of being granted parole if he had been given a hearing in the interim, the court specifically stated that such a finding was irrelevant. *Id.* at 1005. The Ninth Circuit cited its earlier decision in *Flemming v. Oregon Board of Parole*, 998 F.2d 721 (9th Cir. 1993) (ex post facto violation where maximum sentence reduction decreased from 31.6 months to seven months under new regulation), in support of this assertion, but the facts of *Flemming* make it clear that the case is not on point. Although Flemming was not required to "show definitively that he would have gotten a lesser sentence," he did conclusively show that he lost a real opportunity to have his sentence reduced under the new regulation. *Id.* at 725. Morales can make no such showing in this case.

The California decisions, on the other hand, satisfy the second prong of *Weaver* by making specific findings that prisoners in the same position as Morales were not

disadvantaged by application of the law. In *Morris*, the Court of Appeal found:

> The amended statute grants the board discretion to defer the otherwise annual suitability hearings for two or three years for certain life inmates when the board finds that it is not reasonably likely that the prisoner would be found suitable for parole within the next year. In other words, the board has determined the prisoner will pose an unreasonable risk of danger to society if released.
>
> This is no arbitrary decision, but is made only after a full hearing and review of the prisoner's past criminal history, the nature of the commitment offense, his attitude towards the current crime, his institutional behavior, rehabilitation and psychological problems, if any, his age, and whether the prisoner has realistic parole plans or has developed a marketable skill.

166 Cal. App. 3d at 38 (citations omitted). The *Morris* court found that the amended statute had no impact on the prisoners' substantive rights because it did not change the guidelines for determining suitability for parole and there was "no suggestion that respondents would have been granted early release even if the hearings were heard annually." *Id.* at 40. Consequently, the changes were ruled to be procedural and not in conflict with the ex post facto clause. *Id.*

In *Jackson*, the California Supreme Court noted legislative findings with regard to the 1982 amendment to support its conclusion that "the likelihood that the postponement actually delays release on parole until after the next hearing appears slight." 39 Cal. 3d at 473. Specifically, the court found that 90% of inmates are found unsuitable for parole release at the first eligibility hearing and that approximately 85% of inmates are found unsuitable at the second and succeeding hearings. In view of these statistics, the California Legislature saw the amendment "as a means 'to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners *who have no chance of being released.*'" *Id.* (citations omitted; emphasis added; brackets in original).[1]

In addition to the finding that parole was unlikely in any case, the *Jackson* court found additional support for its decision that the amended statute was only a procedural change that didn't impair a prisoner's substantive rights in the extensive procedural rights which inmates have at an eligibility hearing:

> These rights are in place to guard against arbitrary or erroneous decisions, and to ensure that the inmate receives "due consideration" of his or her present suitability for parole.

---

[1] While these findings relate specifically to the 1982 amendment, and not to the 1981 amendment which is at issue in this case, note that the later amendment, and the statistics cited, apply to all inmates and not just those with multiple murder convictions who are covered by the earlier amendment. In light of the wide range of sentences necessarily included in these findings, the statistics almost certainly represent a conservative estimate of the likelihood of parole for an inmate in Morales' position.

> Paramount among these are the right to reasonable assistance in preparing for the hearing, and in the case of life prisoners, the right of counsel at the hearing. Both rights provide an inmate with a meaningful opportunity to argue for a finding of suitability, and, failing that, against a postponement. Section 3041.5 also requires that any postponement of annual review be justified with a statement of reasons. Together, these guarantees act as insurance that any postponement decision be well-founded.

Id. at 473-74.

In this case, Morales was sentenced to a term of imprisonment of 15 years to life and his earliest possible parole date was August 2, 1990. When the BPT held his initial parole consideration hearing in July of 1989, it applied the criteria set forth above and determined that Morales was not suitable for parole because the commitment offense was carried out in a particularly heinous manner, he had an unstable social history including an escalating pattern of criminal conduct and violence, he had committed his second murder while on a previous grant of parole, and he had failed to participate in therapy necessary to help him face and deal with his crime. In summary, the Board found that Morales would pose a threat to public safety if released on parole. Additionally, the Board made a specific finding that it was unreasonable to expect that parole could be granted at a hearing scheduled earlier than three years in the future because his past criminal behavior and recent psychiatric evaluations indicated the need for a longer period of observation and treatment before a parole date could be projected. Based on these findings, the Board determined

that the next hearing should be scheduled three years in the future. Petition for Certiorari at 6 n.2 (quoting parole suitability report dated August 22, 1989).

Far from being an oppressive ex post facto law, the California decisions make it clear that the amended law at issue in this case is a well thought out legislative response to the wasted time and money consumed by holding annual eligibility hearings for inmates who have no chance of parole. This amendment neither changed the parole suitability guidelines nor increased the punishment that Morales was given for his crime. Furthermore, the procedural protections built into the statute insure that a prisoner in Morales' position will not be denied an annual hearing if there is any realistic possibility that he would be granted parole at a hearing the following year thus guaranteeing that the quantum of his punishment will not be changed. As noted above, Morales was considered for parole at the earliest possible date and specific findings were made that he was not suitable for parole at that time and would not be for a period of at least three years into the future. Contrary to the holding of the court below that actual likelihood of parole being granted is irrelevant, such a finding is mandated by this Court's decision in *Weaver*. Absent such a finding, and in light of the fact that specific findings of unsuitability were required from and made by the BPT to justify postponement, the lower court's ruling that the amendment constituted an ex post facto law as applied to Morales is clearly erroneous and should be reversed.

CONCLUSION

Our constitutional protection against ex post facto laws is one of the key defenses of our personal freedoms. Everyday life would have little predictability if we all lived in fear of today's innocent behavior being made criminal

tomorrow. The ex post facto clause does not exist in a vacuum, however, and our legislatures must be given the ability to adapt to societal change and to put programs that aren't functioning properly back on track. When a parole system mandates annual eligibility hearings for the most violent offenders, offenders who are demonstrably unsuitable for parole, the cost to society is immense. This cost falls in part on the state, in the form of the direct costs associated with holding the hearings, and in part on the families of victims who, in addition to the sizeable financial costs of preparation for and travel to the hearings, suffer the even greater emotional cost of annually reliving the murder of a loved one while preparing for and attending hearings to prevent the early release of the murderer. In exchange for these costs, there is no benefit to anyone when both the prisoner and the board know that there is no realistic likelihood of parole being granted.

When the California Legislature saw this problem, it acted to solve it by giving the Board of Prison Terms the discretion to defer parole hearings for multiple murderers upon a finding that the prisoner will not be suitable for parole during the next two or three years. This statutory change was carefully thought out and the procedural protections in place guarantee that no prisoner will wrongfully be denied any realistic opportunity to be granted parole. Surely such a law, which solves a serious problem while harming no one should not be struck down on the unsupported supposition, contrary to the facts and this Court's precedent, that any delay of parole eligibility hearings automatically violates the ex post facto clause. Adopting the requirement that an inmate must show a realistic possibility of being granted parole if a hearing had

been held will prevent this unwelcome result. Amici therefore urge that the decision of the Court of Appeal for the Ninth Circuit be reversed.

DATED: November, 1994.

Respectfully submitted,

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No. 93-1462

In the

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

JOSE RAMON MORALES,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF PENNSYLVANIA, et al. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether states may apply to all inmates new or amended laws or regulations governing the administration of parole as such administrative changes do not implicate the constitutional prohibition against *ex post facto* laws and states have constitutionally-mandated interests in the ability to manage prison populations in light of their unique concerns and finite resources.

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OTHER MATERIALS:

INTEREST OF THE AMICI CURIAE

Amici administer state correctional institutions and face substantial burdens in controlling and managing growing prison populations. Thus, this case presents an issue of fundamental importance to *Amici*--whether the *ex post facto* clause is violated by the retrospective application of a law giving the Board of Prison Terms the discretion to increase the interval between previously annual parole suitability hearings. Its determination will affect each state's ability to administer its correctional system in a manner responsive to the state's particular needs and finite resources.

Aside from its obvious effect of providing prisoners the possibility of conditional release, parole serves important state interests: among them, the deterrence of crime, the protection of society, the rehabilitation of criminal offenders, and the promotion of internal prison security. By regulating the availability of parole, a state is able to control the size of its prison population so as to fulfill its Eighth Amendment mandate to provide prison security. In its parole regulations a state also expresses its legislative judgment as to how and when those who have been convicted of a crime should be returned to society.

"The chief burden of administering criminal justice rests upon the states." *Irvine v. California*, 347 U.S. 128, 134 (plurality) (1954). With this burden in mind, *Amici* urge that states be free to apply administrative changes regarding parole to all inmates within their correctional systems. Such a rule would give deference to the independent power of the states "to articulate societal norms through criminal law." *McClesky v. Zant*, 499 U.S. 467, 491 (1991), and would empower states with the flexibility needed to allocate increasingly-burdened tax revenues as each state deems proper.

SUMMARY OF ARGUMENT

1. The Ninth Circuit relied on *Warden, Lewisberg Penitentiary v. Marrero,* 417 U.S. 653 (1974), to conclude that parole is part of punishment and therefore any retroactive changes in parole administration violate the *ex post facto* clause. The Ninth Circuit's decision highlights the need for this Court to limit *Marrero* to its facts. In *Marrero* the Court was asked to construe a particular federal statute and, in so doing, found that Congress specifically intended therein that parole ineligibility be part of the punishment for certain narcotics offenders. The Court also found it axiomatic that a sentencer would craft a sentence with parole eligibility in mind. During the twenty years since *Marrero*, the statutes it construed have been repealed and the sentencer's discretion to consider and set parole eligibility that *Marrero* assumed has been constrained. States have acted to limit the discretion of sentencers by adoption of mandatory minimum sentences, sentences without the possibility of parole and sentencing guidelines. *Marrero,* therefore, should be limited to its facts and not generally cited for the proposition that parole is part of punishment.

2. In *Collins v. Youngblood*, 497 U.S. 37, the Court returned to the original meaning of the *ex post fact* clause as forbidding the retroactive definition of crimes, defenses and punishments. In clarifying that parole is not "punishment" for purposes of the *ex post facto* clause, the Court can look to the writings of several members of the Court who have separately concluded that "punishment" properly focuses on sentencing and that parole is too speculative to form part of such "punishment." In his concurrence in *Collins,* Justice Stevens proposed limiting the application of the clause to retroactive changes in the elements of a crime or defense or changes in procedure which affect the imposition of the conviction or sentence. Looking at the original meaning of "punishment," Justice Thomas concluded that from the time of the first

Congress to the present day, "punishment" has meant the penalty imposed for the commission of a crime. Writing separately in *Weaver v. Graham*, 450 U.S. 24 (1981), then-Justice Rehnquist proposed an *ex post facto* analysis which looks to the actual effect of the law on the prisoner's release date, rather than to any speculative impact. From *Marrero* through *Collins,* Justice Blackmun consistently expressed the view that parole is not a "penalty' because it is far too speculative. The retrospective application to Morales of California's amended statute governing the scheduling of parole suitability hearings for multiple murderers does not violate the *ex post facto* clause. The most that Morales can claim is that he has lost the annual expectation of the possibility of parole. Such a loss is too speculative to effect an "actual impact;" it does not increase his sentence, or raise any claim among the categories which Justice Stevens proposed as being within the reach of the clause.

3. Parole serves numerous state interests: among them, the constitutionally-mandated responsibilities of providing prison security and adequate care for inmates and the states' inherent authority to enforce the criminal law so as to protect the community through the deterrence of crime and the rehabilitation of criminals. Through the administration of parole, states are able to exercise some control over the size of their prison populations and the cost of administering prison programs. Changes in the administration of parole also express the states' legislative judgment concerning the proper timing and conditions for the re-introduction of offenders into the community. The flexibility to make procedural changes in the administration of parole and the right to apply those changes to all inmates in the correctional system is essential to the states, particularly at a time when they face burgeoning prison populations and sky-rocketing costs. The Court has recognized that it is within the power of the states to regulate procedures under which its laws are carried out and that it should not lightly intrude upon the administration of justice by

the individual states. The administration of various state-created systems of parole are matters within the states' power and should not be subject to the proscription of the federal courts.

ARGUMENT

I. STATES SHOULD BE FREE TO APPLY TO ALL INMATES NEW OR AMENDED LAWS OR REGULATIONS GOVERNING THE ADMINISTRATION OF PAROLE AS SUCH ADMINISTRATIVE CHANGES DO NOT IMPLICATE THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LAWS AND STATES HAVE CONSTITUTIONALLY-MANDATED INTERESTS IN THE ABILITY TO MANAGE PRISON POPULATIONS IN LIGHT OF THEIR UNIQUE CONCERNS AND FINITE RESOURCES.

A. *Warden v. Marrero* Should Be Limited To Its Facts and Not Generally Applied For The Proposition That Parole Is Part of Punishment.

In the case before the Court, the Ninth Circuit held that "any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause." Petition for Writ of Certiorari at A-6, *California Depart. of Corrections v. Morales*, (No. 93-1462). Consequently, the Ninth Circuit found that the *ex post facto* clause was violated by a change in California law abolishing the guarantee of annual parole suitability hearings for multiple murderers. The amended statute gives the Board of Prison Terms discretion to schedule such hearings no later than three years after the denial of a parole date. Such

discretion may be exercised if the Board finds "that it is not reasonable to expect that parole would be granted at a hearing during the following year" and articulates reasons for its conclusion. The Ninth Circuit based its conclusion on "the Supreme Court's observation that the denial of parole is part of a defendant's punishment. *Warden v. Marrero*, 417 U.S. 653, 662 (1974)." *Id.* at A-6.

The Ninth Circuit's recitation of *Marrero* to deny California flexibility in scheduling parole hearings demonstrates the problem with such a blanket application of *Marrero* and provides a good example of why this Court should limit *Marrero* to its facts and allow states greater discretion in the administration of their parole systems.

1. *Marrero* Is a Case of Statutory Construction and Lies Outside This Court's *Ex Post Facto* Jurisprudence.

Marrero, like all cases, must be understood in the context in which it arose. *See Dobbert v. Florida*, 432 U.S. 282, 299 (1977). *Marrero's* statement that parole is part of punishment arose from the interpretation of statutes which have long been repealed and followed from an assumption which has little relevance to state sentencing practices twenty years later. Accordingly, *Marrero* should no longer be followed for the proposition that parole is part of punishment, nor applied to bring administrative changes regulating parole eligibility within the scope of the *ex post facto* clause. *See, e.g., Akins v. Snow*, 922 F.2d 1558 (11th Cir.) *cert. denied*, 501 U.S. 1260 (1991). *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir.), *cert. granted*, 113 S.Ct. 2412 (1993), *cert. dismissed*, 114 S.Ct. 593 (1994); *Rodriguez v. United States Parole Comm'n*, 594 F. 2d 170 (7th Cir. 1979).

A brief review of the facts of *Marrero* demonstrates that the factual and legal underpinnings of the case are, in crucial respects, out-dated. Marrero was convicted of narcotics

offenses and was sentenced, before May 1, 1971, to ten years' imprisonment. At the time of his sentencing, 26 U.S.C. § 7237(d) provided that certain narcotics offenders sentenced to mandatory minimum prison terms, including Marrero, were ineligible for parole under the general parole statute, 18 U.S.C. § 4202. The latter statute allowed a prisoner to be released on parole after serving one-third of his term, and further allowed the sentencing judge to make the defendant eligible for parole prior to that time. *Marrero*, 417 U.S. at 654-655, and *id.* nn. 1 and 2. While Marrero was serving his sentence, section 7237(d) was repealed, effective May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Under the 1970 Act almost all narcotic offenders were eligible for parole under the general parole statute, 18 U.S.C. § 4202. The question for the *Marrero* Court was whether the parole ineligibility provisions of 26 U.S.C. § 7237(d) had survived repeal by the 1970 Drug Act. The Court concluded that Marrero remained *ineligible* for parole because the 1970 Drug Act specifically provided at section 1103(a) that prosecutions for offenses occurring prior to the effective date of the Act were not affected by its repeals, and also because the general savings clause, 1 U.S.C. § 109, provided that "the repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide. . ." 417 U.S. at 655-656, and *id.* at nn. 4 and 5.

In determining that Marrero remained ineligible for parole, the Court looked to *Bradley v. United States*, 410 U.S. 605 (1973). In *Bradley*, the Court had considered the related question of the application of the 1970 Drug Act to offenders who committed narcotics offenses before the Act's May 1, 1971, effective date but who had been convicted and sentenced after the Act's effective date. The Court held that sentencing was a part of "prosecution" and that the Drug Act's specific provision that prosecutions occurring before its effective date were not to be affected by the Act's repealers "barred the

sentencing judge from suspending the sentences of, or granting probation to, the *Bradley* petitioners and also barred him from making them eligible for early parole before they had served one-third of their sentences, under 18 U.S.C. § 4208(a)." *Marrero*, 417 U.S. at 657 and *id.* at n.8. *Marrero* understood *Bradley's* conclusion to be based on the fact "that, since a District Judge's decision to make an offender eligible for early parole is made at the time of entering a judgment of conviction, the decision was part of the sentence and therefore also part of the 'prosecution.'" 417 U.S. at 658.

"Similarly," said Justice Brennan, writing for the Court, "a pragmatic view of sentencing requires the conclusion that parole eligibility under 18 U.S.C. § 4202 is also determined at the time of sentence." 417 U.S. at 658. This "pragmatic view" rested on the statute's early parole provisions and Justice Brennan's assumption about what considerations went into the imposition of a sentence.

> *[B]ecause it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole*, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, *parole eligibility can be properly viewed as being determined--and deliberately so--by the sentence of the district judge.*

417 U.S. at 668 (*emphasis added*). Justice Brennan concluded that eligibility for parole under section 4202 was thus determined at the time of sentencing and, under the teaching of *Bradley*, was part of the "prosecution" saved by § 1103(a). *Id.*

Marrero also considered the question of "whether the prohibition of 26 U.S.C. § 7237(d) against the offender's eligibility for parole under 18 U.S.C. § 4202 is a 'penalty,

forfeiture, or liability' saved from release or extinguishment by 1 U.S.C. § 109." 417 U.S. at 660. The Court determined that the word 'penalty' previously had been construed as having been understood by Congress as including "all forms of punishment for crime." 417 U.S. at 661, citing *United States v. Reisinger*, 128 U.S. 398, 402-403 (1888). The Court then looked at the legislative history of 26 U.S.C. § 7237(d) and found a Congressional intent that ineligibility for parole be treated as part of the "punishment" for narcotics offenders. 417 U.S. at 661-662. "Thus, at least where, as in the case of respondent's narcotics offenses, Congress has barred parole eligibility as a punitive measure, we hold that the no-parole provisions of § 7237(d) is a 'penalty, forfeiture, or liability' saved by § 109." 417 U.S. at 664. Here, too, *Marrero's* equation of parole ineligibility with punishment is fact-specific. It rests entirely on the specific intent of Congress in section 7237(d) to make parole ineligibility part of the punishment for narcotics offenses.

Marrero, then, is a case of statutory construction and lies outside this Court's *ex post facto* jurisprudence. While *Marrero* was cited in passing in *Weaver v. Graham*, 450 U.S. 24 (1981), for the proposition that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed," *id.* at 32, it has not otherwise played a significant role in *ex post facto* jurisprudence. This is as it should be. *Marrero's* conclusion that parole is part of punishment--*i.e.*, sentencing--derives from the consideration of particular statutory schemes which have since been repealed.[1] Moreover, comprehensive changes

[1]18 U.S.C. § 4202, as existing at the time of the *Marrero* decision, was repealed in 1976 in the general revision of Title 18. 18 U.S.C.A. § 4202 (West 1994) historical note. 18 U.S.C. § 4208, as existing at the time of the *Marrero* decision, was also repealed in 1976 in the general revision of Title 18. 18 U.S.C.A. § 4208 historical note. Parole was totally abolished in the federal system by the repeal of 18 U.S.C. § 4205(a), effective Nov. 1, 1987, by Pub. L. No. 98-473, tit. II, §§ 218(a)(5), 98 Stat. 2027, 2031 (1984).

in federal and state sentencing provisions have eviscerated its underlying assumption about the basic considerations of sentencing.[2]

2. In The Twenty Years Since *Marrero*, States Have Limited The Discretion of Sentencing Courts By Adopting Sentencing Guidelines and Mandatory Minimum Sentences.

Wide-reaching changes in criminal jurisprudence during the two decades which have passed since *Marrero* fundamentally undermine *Marrero's* conclusory assumption that sentencing decisions are always made with express consideration of the offender's parole date. *See* 417 U.S. at 668. This assumption had validity when Justice Brennan wrote *Marrero* in 1974. For one, 18 U.S.C. § 4208(a) (set forth in *Marrero* at 417 U.S. 653, n.8) specifically empowered the sentencing judge to designate in the sentence a minimum term after which the defendant could be eligible for parole. This term could be less than the standard time for parole eligibility established by 18 U.S.C. § 4202 (set forth at 417 U.S. 655 n.2). Under this scheme, parole eligibility was explicitly considered at sentencing. In a more general sense, the structure of the federal indeterminate-sentencing system, which gave wide discretion to the court to fashion a sentence, or even suspend a sentence, also gave credence to *Marrero's*

[2]Because of the facts of the case, it was not necessary for the court in *Marrero* to consider the important state interests served by parole as discussed in Part C, *infra*. These interests also support limiting *Marrero* to its facts.

assumption that the sentencer always, and deliberately, considered parole eligibility when imposing sentence.[3]

Disparate sentences resulted from such unfettered discretion and in 1958 a movement began in Congress to formulate standards and criteria for sentencing. *Mistretta v. United States*, 488 U.S. 361, 365 (1988) at 365. This movement culminated with the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3351 *et seq.* (1982 ed., Supp. IV). Among other things, the Act created the United States

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[3]In *Mistretta v. United States*, 488 U.S. 361 (1988), the Court described the federal sentencing structure as it existed prior to the adoption of the Sentencing Reform Act of 1984.

> For almost a century the federal government employed in criminal cases a system of indeterminate sentencing. Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether restraint, such as probation should be imposed instead of imprisonment or fine. This indeterminate-sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the "guidance and control" of a parole officer. See *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938).
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> . . . Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence by the resulting growth of an elaborate probation system . . . . Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment.

488 U.S. at 363 (1988).

Sentencing Commission which was directed to devise guidelines for sentencing. 28 U.S.C. §§ 991 and 994. All sentences were made basically determinate. A prisoner is released at the completion of his sentence reduced only by any credit earned by good behavior while in custody. 18 U.S.C. §§ 3624(a) and (b). The Sentencing Commission's guidelines are binding on the courts; a judge may only depart from the guidelines on the finding of an aggravating or mitigating factor not adequately considered by the Commission when formulating the guidelines. *Mistretta*, 488 U.S. at 365-367. As Justice Scalia noted, "While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,'. . . they have the force and effect of laws . . . . A judge who disregards them will be reversed. . . ." *Id.* at 413 (Scalia, J., dissenting) (internal citations omitted).

In response to the same concerns that guided Congress, many states also adopted changes in their sentencing schemes during the twenty years which have passed since *Marrero*. "First, most jurisdictions have adopted determinate sentencing schemes that narrow the range of sanctions available to trial courts and reduce or eliminate the broad discretion previously exercised by corrections administrators and parole boards. At the same time, legislatures have enacted mandatory sentencing laws that require significantly enhanced punishment in a large number of felony prosecutions, particularly those involving violent crimes and drug trafficking." Gary T. Lowenthal, *Mandatory Sentencing Laws; Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61, 61-62 (1993).

Of course, even with such changes, an inmate's *initial* eligibility for parole bears a certain relationship to the sentence imposed. It is generally the "front end" of a sentence which determines a prisoner's parole eligibility date. A person serving ten to twenty years in prison will, necessarily, reach a parole *eligibility* date before the person serving fifteen to thirty years. What has changed significantly since *Marrero* is

that sentencers have far less discretion in setting the "front end" of a sentence. States have limited the courts' discretion in sentencing by the adoption of laws establishing mandatory minimum sentences, sentences without the possibility of parole, and sentencing guidelines. States have prescribed mandatory minimum sentences for such offenses as crimes committed with a firearm, drug law violations and crimes committed against children.[4] In other instances state legislatures have eliminated entirely the possibility of parole for certain offenses, notably drug law violations and crimes of violence.[5] States have also acted to limit the sentencer's discretion in setting the minimum date of the sentence by adopting sentencing guidelines. "Some state legislatures, . . . have prescribed a presumptive sentence for each statutory offense, with a narrow range of permissible deviations from the legislative presumption. Other states. . .have structured sentencing discretion by requiring judges to follow guidelines

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[4]*See, e.g.*, Ala. Code § 13A-12-231 (1994) (mandatory prison sentences for drug offenders); Ariz. Rev. Stat. Ann § 13-3407 (Supp. 1994) (mandatory prison terms for drug traffickers); Con. Gen. Stat. § 21a-278 (1994) (mandatory minimum sentence for certain drug offenses); N.J. Stat. Ann. § 2C: 43-6(c) (1982) (mandatory minimum sentence for use or possession of a firearm in the commission of specified offenses); 42 Pa. Cons. Stat. Ann. § 9712 (1982) (mandatory minimum sentence for persons convicted of specified offenses and found to have visibly possessed firearm during commission of offense); Utah Code Ann. § 76-5-402.1 (1953 and Supp. 1994) (mandatory minimum sentence for rape of a child).

[5]*See, e.g.*, Ala. Code § 13A-12-231(2)(d) (1994) (mandatory life imprisonment without possibility of parole for certain drug offenders); Md. Ann. Code of 1957 Art. 27 §§ 286 and 286D (1992) (eliminating the possibility of parole for certain drug offenders); Minn. Stat. Ann. § 609.11(6) (1987) (no parole eligibility for persons convicted of specified offenses); N.D. Cent. Code § 12.1-32-02.1 (1993) (no parole eligibility if person convicted has inflicted bodily injury or has used or threatened to use a dangerous weapon in the commission of the offense); Pa. Stat. Ann. tit. 61 § 331.21 (1994) (no possibility of parole for person sentenced to life in prison).

promulgated by a sentencing commission." Lowenthal, *supra* at 63, *citing* as examples of states with prescribed presumptive sentences: Alaska Stat. §§ 12.55.125-.145 (1990); Ariz. Rev. Stat. Ann. §§ 13-701,-.702 (1991); Colo. Rev. Stat. § 18-1-105 (Supp. 1991); Ill. Ann. Stat. ch. 38, paras. 1005-5-1 to-3 (Smith-Hurd Supp. 1992); Ind. Code Ann. §§ 35-50-2-1 to-10 (West 1986 & Supp. 1991); N.C. Gen. Stat. §§ 14-1.1, 15A-1340.4 (1986 & Supp. 1991).

Pennsylvania, which is among the states to have adopted sentencing guidelines[6] mandates that the court consider the sentencing guidelines, but permits sentencing outside the guidelines, if the court provides a contemporaneous written statement of its reasons for deviation. Failure to comply is grounds for vacating the sentence and resentencing the defendant. 42 Pa. Const. Stat. Ann. § 9721(B) (1994).

When, as is often the case, the sentencer has no discretion in imposing the minimum sentence, or when his discretion is constrained by the requirement that sentencing guidelines be adhered to for all but the most compelling of reasons, the discretionary aspect of sentencing relied on by *Marrero* diminishes in importance.

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[6]*See, e.g.*, Ark. Code Ann. § 116-90-801-04 (Supp. 1993); Fla. Stat. Ann. §§ 921.001-.188 (Supp. 1994); Kan. Crim. Code Ann. § 21-4701-02 (Vernon 1993); Minn. Stat. Ann. § 244.09 (West 1992); Or. Rev. Stat. Ann. § 137.663-.677 (1993); Wash. Rev. Code Ann. §§ 9.94A.340-.420 (Supp.1994)

B. A Parole Suitability Hearing Confers, At Most, The Expectation of the Possibility of Parole, and Such an Expectation Is Outside The Scope of the *Ex Post Facto* Clause As Construed By *Collins v. Youngblood*.

1. *Collins v. Youngblood* Narrows the Reach of the *Ex Post Facto Clause* To The Categories Encompassed By Its Original Understanding.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court acknowledged that in construing the *ex post facto* clause "[o]ur cases have not attempted to precisely delimit the scope of this Latin phrase, but have instead given it substance by an accretion of case law." *Id.* at 292. In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court's most recent *ex post facto* decision, the Court signaled a turn away from further accretion of *ex post facto* jurisprudence and a return toward the original meaning of the clause. In achieving this end, the Court looked to the exposition of the *ex post facto* clause as set forth in *Beazell v. Ohio*, 269 U.S. 167 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, *which makes more burdensome the punishment for a crime*, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Id. at 169-170 (*emphasis supplied*). Chief Justice Rehnquist, writing for the Court in *Collins* said, "The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *ex post facto* clause: Legislatures may not retroactively

alter the definition of crimes or increase the punishment for criminal acts." *Collins*, 497 U.S. at 43.

In *Collins* the Court limited the importance of the distinction between procedural and substantive changes which had previously dominated *ex post facto* jurisprudence. The Court acknowledged that this distinction had "imported confusion into the interpretation of the *Ex Post Facto* clause." 497 U.S. at 45, most particularly, language to the effect that

> a procedural change may constitute an *ex post facto* violation if it 'affect[s] matters of substance,' *Beazell, supra*, at 171, by depriving a defendant of 'substantial protections with which the existing law surrounds the person accused of crime,' *Duncan v. Missouri*, 152 U.S. 377, 382-383 (1894), or arbitrarily infringing upon 'substantial personal rights.' *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915); *Beazell*, [269 U.S.] at 171.

Collins, 497 U.S. at 45. Seeking to "make sense" of the cases, the Court made two observations limiting the impact of the "procedural/substantive" distinction: on the one hand, a legislature does not immunize a law from scrutiny under the *ex post facto* clause simply by labeling it "procedural;" conversely, "[t]he references in *Duncan* and *Malloy* to 'substantial protections' and 'personal rights' should not be read to adopt without explanation an undefined enlargement of the *Ex Post Facto* clause." *Id.* at 46.

In over-ruling two early cases, *Collins* also held that a law does not violate the *ex post facto* clause merely because it retrospectively alters the situation of the criminal defendant to his disadvantage nor merely because it deprives the defendant of a substantial constitutional right. In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court had concluded that because the new Missouri Constitution denied Kring the benefit of an implied acquittal, which the previous law provided, it "altered the situation to his disadvantage, and

therefore violated the *ex post facto* clause. *Id.* at 235-236. The Court in *Collins* disagreed. Noting that Missouri had not changed any of the elements of murder or any defense to the conduct, but had merely changed its law respecting the effect of a guilty plea to a lesser included offense, the Court found that *Kring* could be justified only if the *ex post facto* clause is thought to include "any change which 'alters the situation of a party to his disadvantage.'" *Collins,* 497 U.S. at 50. The Court rejected such a reading as unfaithful to the original understanding of the clause. *Id.*

In the second over-ruled case, *Thompson v. Utah,* 170 U.S. 343 (1898), the Court held "that since Utah was a territory when Thompson committed a crime, and was obligated under the Sixth Amendment to provide a 12-person jury, the *Ex Post Facto* clause prevented the State from taking away that substantial right from him when it became a State and was no longer bound by the Sixth Amendment as then interpreted." *Collins,* 497 U.S. at 51, *see Thompson*, 170 U.S. at 352-353. The *Collins* court stated,"The right to a jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* clause." 497 U.S. at 51.

2. As Several The Members Of This Court Have Expressly Recognized, "Punishment" For *Ex Post Facto* Purposes Properly Focuses On The Sentence and Parole Is Not Part of the Sentence.

As *Collins* has retracted the reach of the *ex post facto* clause so that for purposes of this argument, it applies only to "punishment," the basic question becomes whether parole is punishment for purposes of the *ex post facto* clause. In considering this question, the Court can draw on the views of several Justices who have discussed the meaning of parole and

punishment in varying contexts and concluded that "punishment" properly focuses on the sentence imposed by the court, and that parole is too speculative to be considered part of that sentence.

a. "Punishment" For *Ex Post Facto* Purposes Focuses on the Sentence.

In his concurrence in *Collins,* Justice Stevens wrote that he would limit the application of *ex post facto* analysis to changes in the elements of a crime or defense and changes in procedure which affect the imposition of the conviction or sentence. Under Justice Stevens' analysis, a procedural change has no *ex post facto* significance unless, at a minimum: (l) the defendant claims he was denied procedural protections relevant to the determination of guilt or innocence; (2) the defendant claims the sentence imposed was unauthorized by law or was the consequence of improper procedures; or, (3) the defendant argues the deprivation of any avenue of review for correcting errors that may have vitiated the validity of the sentence or conviction. *Collins,* at 497 U.S. 59. (Stevens, J., concurring). Justice Stevens noted that "postconviction processes" are not part of sentencing and, therefore, do not raise *ex post facto* concerns. "[I]t is difficult to imagine how a retroactive law could, when viewed from the standpoint of the date the offense was committed, implicate substantial rights of any defendant if the law does no more than expand the flexibility of postconviction processes available to the State with respect to a defendant who is subject to a valid conviction and sentence." 497 U.S. at 36037.

Justice Thomas, writing in the context of the Eighth Amendment, concluded that the word "punishment" means today precisely what it meant when the First Congress ratified the Eighth Amendment was ratified: "the penalty imposed for the commission of a crime. *Helling v. McKinney,*

113 S.Ct. 2475, 2483 (1993) (Thomas, J., joined by Scalia, J., dissenting) Justice Thomas also found that any affirmative historical evidence as to the meaning of punishment at the time of the Eighth Amendment's ratification was consistent with the ordinary meaning of the word. "Thus, although the evidence is not over-whelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that *judges or juries--but not jailers*--impose 'punishment.'" *Id.* at 2484 *(emphasis added)*. In *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), Justice Thomas reiterated his view that "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence." *Id.* at 1990 (Thomas, J., concurring). As Justice Thomas understands punishment, it would not include parole or regulations governing parole.

While the Court did not adopt Justice Thomas' "original interpretation" approach to the meaning of "punishment" in the context of the Eighth Amendment, the Court has expressly adopted such an approach with regard to the meaning of the *ex post facto* clause. Thus, Justice Thomas' observations as to the historical meaning of "punishment" at the time of the First Congress have particular force in *ex post facto* analysis.

b. Parole Is Too Speculative To Be Considered Part Of The Sentence for *Ex Post Facto* Analysis.

In an opinion denying a stay of a Ninth Circuit judgment, then-Justice Rehnquist held that the terms of a sentence were in no way altered by the fact that parole was revoked under statutory guidelines in force at the time of the revocation hearing and not under statutory guidelines which existed at the time of sentencing. *Portley v. Grossman*, 444 U.S. 1311 (1980) *(opinion in chambers)*. Justice Rehnquist

viewed the parole revocation standards as a framework for the federal Parole Commission's exercise of its statutory discretion. Because the amended guidelines did not increase the terms of confinement imposed by the judge and because at sentencing the defendant knew that parole violations would put him at risk of serving the balance of his sentence in custody, "The guidelines . . ., neither deprive applicant of any pre-existing right nor enhance the punishment imposed." *Id.* at 1312-1313.

Justice Rehnquist stated that even if it were assumed that the *ex post facto* clause applies to parole, "changes in administrative guidelines articulating the factors relied on by the [Parole] Commission in making parole and reparole decisions" were not impermissible. Looking to what was then the Court's most recent *ex post facto* decision, *Dobbert v. Florida*, 432 U.S. 282 (1977), Justice Rehnquist noted that the prohibition against *ex post facto* laws did not apply to every change in the law which worked to the disadvantage of the defendant. "It is intended to secure 'substantial personal rights' from retroactive deprivation and does not 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'" *Portley*, 444 U.S. at 1312.

A year after Justice Rehnquist's opinion in *Portley*, the Court held that application of a change in Florida's "gain time" statute to a prisoner convicted and sentenced before the change worked an *ex post facto* violation. *Weaver*, 450 U.S. at 24. Writing separately in *Weaver*, Justice Rehnquist proposed looking to the actual effect of the law on the prisoner's release date, rather than to any speculative impact. "'It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.'" 450 U.S. at 37, quoting *Dobbert*, 432 U.S. at 294 (Rehnquist, J., concurring in the judgment). Applying this test, Justice Rehnquist found *Weaver* a "close" case. Comparing the two statutes *in toto*, he found the new statute more onerous than the old, because the

reduction in the amount of gain time accrued automatically through good conduct was not,on balance,offset by new opportunities to earn gain time offered by the amended statute. 450 U.S. at 37-38.

Justice Rehnquist made it plain that he did not intend to suggest that a state could not increase the discretionary powers of prison authorities with respect to "good time" without running afoul of the *ex post facto* clause. "This is not to say, however, that *no* reduction in automatic gain time, however slight, can ever be offset by increases in the availability of discretionary gain time, however great, or that reductions in the amount of credit for good conduct can never be offset by increases in the availability of credit which can be earned by more than merely good conduct." 450 U.S. at 38 (emphasis added).

Similarly, in a prescient dissent from the holding in *Marrero*, Justice Blackmun,[7] wrote that parole eligibility is not a"penalty" because it is too speculative.

> . . . Respondent Marrero in no way is seeking to avoid punishment for his criminal act, and he is still fully subject to the service of his sentence. What Marrero seeks is merely the opportunity to be *considered* for parole. Eligibility for parole will not free him from his imposed sentence. The decision whether he should be accorded parole lies within the discretion of the Board of Parole. If for any

[7]Although Justice Blackmun is no longer on the Court, his views are particularly relevant because only he and the Chief Justice remained on the Court from the *Marrero* decision through the Court's refinement of its *ex post facto* jurisprudence in *Collins*. Justice Blackmun consistently held the view that the grant of parole did not relieve a convict of the obligation of his sentence and that a parole hearing afforded only the possibility of parole.

> reason the Board feels that parole would not be appropriate for the respondent, it can be denied, and Marrero will remain incarcerated for the term to which he is subject. Moreover, even if parole is deemed appropriate and is granted, respondent still would be subject to the conditions the parole authorities choose to place on his conditional freedom. . . . The sentence to be served by respondent is still 10 years, whether or not he is granted parole.

417 U.S. at 666-667 (Blackmun, J., dissenting) (emphasis in the original).

Justice Blackmun, concurring in *Weaver*, 450 U.S. 24 (1981), proposed an analysis that followed his thoughts in the *Marrero* dissent. He believed that the Court's prior decision in *Lindsey v. Washington*, 301 U.S. 397 (1937), required that he accede to the Court's judgment in *Weaver*. *Lindsey* held "[t]he Constitution forbids the application of any new punitive measure to a crime already committed, to the detriment or material disadvantage of the wrongdoer." 301 U.S. at 401, (quoting *Kring*, 107 U.S. at 228-229; *In re Medley*, 134 U.S. 160, 171 (1890); *Thompson v. Utah*, 170 U.S. at 351 (1898). However,Justice Blackmun offered that were the Court writing on a clean slate, he would have reached a different result.

> My thesis would be: (a) the 1978 Florida statute operates only prospectively and does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute.

Weaver, 450 U.S. at 37. (Blackmun, J., concurring in the judgment).

By specifically over-ruling *Kring*, and *Thompson*, *Collins* "cleans the slate" for an analysis that recognizes that parole is not punishment for purposes of the *ex post facto* clause. *Collins* changes the relevant inquiry from whether a law "disadvantage[s] the offender affected by it, "*Lindsey*, 301 U.S.at 401, to whether the law affects the punishment of the offender. As Justice Blackmun saw in *Marrero*, and other Justices have since echoed,the "punishment" imposed on a defendant for *ex post facto* purposes is the sentence imposed by the Court. *Marrero*, 417 U.S. at 667 (Blackmun, J., dissenting), *see Helling*, 113 S.Ct. at 2484 (Thomas, J., dissenting); *Collins*, 497 U.S. at 36-37 (Stevens, J., concurring). Because parole has only a speculative connection to that sentence, it follows that the terms and conditions by which the states regulate eligibility for parole lie outside the scope of the *ex post facto* clause.

3. This Case Clearly Illustrates That Parole Is Not Punishment and That Regulation of Parole Lies Outside The Scope of the *Ex Post Facto* Clause.

California's statutory change giving the Board of Prison Terms the discretion to impose a three-year interval between parole suitability hearings, where the prisoner, as Morales, has been convicted of more than one murder, takes away nothing that Morales had earned or accumulated prior to its enactment. Like "good time," parole is something to be earned. While parole bears some relationship to a sentence, it is not part of the sentence. The effect of the new parole statute was to remove some of Morales' "hope and a portion of his opportunity" for parole. Accordingly, application of California's amended law governing the scheduling of parole

eligibility hearings did not enhance the sentence imposed on Morales.

Moreover, if Chief Justice Rehnquist's "actual effect" test, as articulated in his concurrence in *Weaver*, is applied to Morales it is clear that application of California's amended statute to him has had no "actual effect." The only loss Morales can point to is the thin expectation of the possibility that a parole date would have been set in 1990 had a parole suitability hearing been held the year following his initial hearing in 1989.[8] That a parole date would have been set the following year appears highly unlikely. After Morales' initial parole suitability hearing on July 15, 1989, the Board of Prison Terms made the assessment that Morales was unsuitable for parole for a variety of articulated reasons, including the "heinous, atrocious and cruel manner" in which the offense was carried out, his record of violence and assaultive behavior, and his need for prolonged psychiatric evaluation, observation, and treatment. Based on these reasons, the Board concluded "it is not reasonable to expect that parole would be granted at a hearing scheduled earlier" than the three-year interval set by the Board. Petitioner's Brief on the Merits, at 9 *California Depart. of Corrections v. Morales*, (No. 93-1462).

Unlike the situation in *Weaver*, no actual benefit automatically accrued to Morales under the prior California statute which provided for annual parole suitability hearings. He had, at most, the annual expectation of a possibility that a parole date would be set. He now has that expectation less frequently. As one of the Justices posed at oral argument in

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[8]Morales was sentenced to fifteen years to life in prison for his second murder conviction. Until he completes his prescribed minimum term, the most benefit Morales could obtain from a parole suitability hearing is the establishment of a future parole date, and that date could be revoked at the discretion of the Board of Prison Terms. Joint Appendix at 13, *California Dept. of Corrections v. Morales*, (No. 93-1462).

Cavanaugh v. Roller, where an *ex post facto* challenge was raised to a South Carolina statute similar to the one at issue here: "So how have your expectations been changed by changing your hearing from one year to two years? You had no expectation to start off with, now you have that expectation, that non-expectation, less frequently. I don't see how that puts you in a worse position." Transcript of Oral Argument, November 8, 1993, at 38, *Cavanaugh v. Roller*, (No. 92-1510), *cert. dismissed*, 114 S.Ct. 593.

Measuring the application of California's amended law to Morales against the test proposed by Justice Stevens in his concurrence in *Collins* likewise leads to the conclusion that the retrospective application of the amended law to Morales lies outside the scope of the *ex post facto* clause. Morales makes no claim that he has been denied procedural protections relevant to the determination of guilt or innocence. Nor does he claim the sentence imposed was unauthorized by law or the consequence of improper procedures. He makes no argument regarding the deprivation of any avenue of review for correcting errors that may have vitiated the validity of the sentence or conviction. In short, this is a classic example of a change that "does no more than expand the flexibility of postconviction processes available to the State with respect to a valid conviction and sentence," *Collins*, 497 U.S. at 36-37 (Stevens,J., concurring).

C. States Need Flexibility in Parole Administration To Carry Out Their Constitutional Responsibilities.

The conclusion that administrative changes in parole are not within the scope of the *ex post facto* clause is further buttressed by consideration of the states' constitutional interests in flexible parole administration. Parole is a necessary mechanism for states to fulfill their constitutionally mandated responsibilities of providing prison security and

adequate care for inmates and to carry out their inherent authority and responsibility to enforce the criminal law so as to protect the community through deterrence of crime and rehabilitation of criminals. States need flexibility in parole administration to achieve these constitutional imperatives, particularly in light of the burgeoning size of prison populations and the costs of prison administration.

States have well-recognized constitutional interests ir prison administration. The Eighth Amendment requires state prison officials to take reasonable measures to guarantee prison security and order and to provide adequate food, clothing, shelter and medical care. *Farmer v. Brennan*, 114 S.Ct. at 1976. Moreover, "primary authority for defining and enforcing the criminal law" lies with the States. *Engle v. Isaac*, 456 U.S. 107, 128 (1982). The states' constitutional interest in enforcement of criminal law necessarily includes certain penological interests recognized by this Court, including the deterrence of crime, the rehabilitation of persons committed to prisons and the internal security of the corrections facilities themselves. *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974). As the Court has recognized in other contexts, these state interests in prison administration often outweigh prisoners' constitutional rights in the conditions of their confinement. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Flexibility in parole administration is necessary for states to fulfill the Eighth Amendment duties to insure prison security and order. To provide adequate security and care to inmates, a state must be able to control the size and costs of its prison population. As the Court has recognized, parole serves this purpose. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). Through its parole procedures a state is able to regulate, to some degree, the size of its prison population and, in so doing, gain some control over prison security and the cost of its correctional system. Faced with burgeoning prison

populations and sky-rocketing costs, states need the flexibility to manage prison populations and costs in a manner that is responsive to their unique needs and finite resources. The ability to make procedural changes in the administration of parole, and the right to apply those changes to all inmates in the correctional system, is essential to these key interests.

Such control is increasingly crucial in light of the growing size and cost of state prison administration. In 1995 the nation's prison population will reach one billion. The state of California will spend $3.1 billion to keep some 220,000 persons behind bars. Texas will spend $1.5 billion to run its prisons. New York will spend $1.4 billion. Dan Morain, *California's Prison Budget: Why Is It So Voracious?*, Los Angeles Times (Washington, D.C. edition), Oct. 20, 1994, at A1, A6. In the past ten years, the number of inmates housed by California increased by 90,000 and the state built 16 new prisons. In the next five years, California state corrections officials estimate that the state's prison population will grow by about 100,000 and 25 new prisons will be needed. Each prison will cost about $200 million to build, for a total of $5 billion in construction costs, plus interest. Dan Morain, *California's Profusion of Prisons*, Los Angeles Times (Washington, D.C. edition), Oct. 17, 1994, at A1, A6. In a survey of fifty states and the District of Columbia conducted between August and October of 1991, twenty-nine of forty-five responding jurisdictions reported that planned construction of new prisons was inadequate for population increases projected to the year 2000. Bureau of Justice Statistics, U.S. Dept. of Justice, *Sourcebook of Criminal Justice Statistics--1992*, Table 6.68, citing *Corrections Compendium* (CEGA Publishing, November 1991, pp. 7-12).

In this context, states cannot accomplish their constitutional goals if they are burdened with needless administrative costs. When a state makes the judgment that its limited fiscal and personnel resources can no longer bear the burden of guaranteeing annual parole hearings to a class of

persons, such as multiple murderers, for whom such frequent hearings are essentially futile because of their previously demonstrated unwillingness or inability to respect human life, states should be free to conform their regulation of parole to accommodate this concern. Similarly,if budgetary constraints require a diminution of parole board members from seven to five, states should be free to change the size of the board without the needless expense and administrative burden of maintaining a seven-member board to consider matters raised by inmates convicted before the administrative change.

Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McClesky v. Zant*, 499 U.S. ___,___, 111 S. Ct. 1454, 1469, (1991). Justice Kennedy, joined by Justices O'Connor and Souter, and writing on the subject of sentencing in the context of the Eighth Amendment said, "State sentencing schemes may embody different penological assumptions. . .[but] even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991). (Kennedy, J., joined by O'Connor, J. and Souter, J., concurring in part and concurring in the judgment). This same rationale applies with equal force to the area of parole administration. Differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding parole regulation.

Just as states require flexibility in parole administration to meet their Eighth Amendment goals of maintaining prison order and providing adequate care, so, too, states require flexibility in parole administration to enforce their constitutionally reserved powers to enforce the criminal law. Standards for the availability of parole provide an inducement for good behavior; thus, they not only promote internal security, but also serve a deterrent and rehabilitative purpose. By establishing standards for the denial of parole, a state is

able to fulfill its obligations to protect society from the premature re-introduction of unrehabilitated offenders.

In the interest of protecting the community, if a state finds, as California did, that prisoners who have been convicted of more than one offense which involved the taking of a life, are less likely to be suitable candidates for parole, the state should be free to give the officials who determine parole suitability the flexibility to schedule parole hearings for this class of prisoners less frequently than those scheduled for the general prison population. Or, for example, if a state finds that early-paroled sex offenders tend to be recidivists, then the state should be free to protect the community by applying its empirical evidence to all such inmates within its system and making retroactive adjustments to its parole eligibility regulations. If a state determines that its citizens would be best protected by requiring victim notification of pending parole eligibility hearings for "stalkers", the state should be free to adopt such a requirement and apply it for the benefit of all victims of such present incarcerees.

California's decision to abolish guaranteed yearly parole hearings for multiple murderers bears a reasonable relationship to the legitimate penological interests of deterring crime and rehabilitating prisoners. The statutory scheme depriving those who have taken more than one life the guarantee of an annual parole hearing is directly related to the reasonable assumption that multiple murderers are less likely to be suitable candidates for parole. Nonetheless, the actual decision not to grant another parole hearing in a year is made only after an individualized assessment of the degree of the inmate's present unsuitability for parole and the judgment as to the likely amount of time needed to rectify such unsuitability.

This Court has stated "that we should not lightly intrude upon the administration of justice by the individual states." *Patterson v. New York,* 432 U.S. 197, 201 (1977)

> Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out. . . , " and its decision in this regard is not subject to proscription . . . unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. at 432 U.S. 197, 201-202 (1977), quoting *Speiser v. Randall,* 357 U.S. 513, 523 (1958); *Leland v. Oregon,* 343 U.S. 790, 798 (1952); *Synder v. Massachusetts,* 291 U.S. 97, 105 (1934).

The question of how various state-created systems of parole should be administered, embracing such concerns as the scheduling of parole suitability hearings, the constitution of Parole Boards, the establishment of necessary quorums and the determination of what percentage of voting members is needed for a binding decision, are matters of administration. These enumerated concerns, and others of a similar nature, are matters within the states' power "to regulate procedures under which its laws are carried out."

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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(9)

No. 93-1462

In The

Supreme Court of the United States

October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSE RAMON MORALES,
a/k/a PABLO JOSE RAMON MORALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE BY THE STATE OF GEORGIA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

IS A DETERMINATION TO EXTEND THE TIME BETWEEN AN INMATE'S PAROLE HEARINGS LIMITED BY THE RESTRICTIONS OF THE EX POST FACTO CLAUSE WHICH PROHIBIT RETROACTIVE ENHANCEMENT OF PUNISHMENT?

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COMES NOW the State of Georgia, by and through Michael J. Bowers, Attorney General for the State of Georgia, and presents this its Brief Amicus Curiae in support of Petitioners. For the reasons set forth, the decision of the court below should be reversed.

OPINIONS BELOW

The original panel decision of the Ninth Circuit Court of Appeals was reported in *Morales v. California*

Department of Corrections, 16 F.3d 1001 (9th Cir. 1994) and decided February 9, 1994.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 9, 1994. This appeal comes by Petition for Certiorari which was granted by this Court on September 26, 1994 in Case No. 93-1462.

CONSTITUTIONAL PROVISION

United States Constitution, Art. I, Sec. X, Cl. I, which states "no state shall . . . pass any . . . *ex post facto* law. . . . "

INTEREST OF THE AMICUS CURIAE

This brief represents the interests of the State of Georgia and the Georgia State Board of Pardons and Paroles. The Georgia State Board of Pardons and Paroles was the defendant/appellee in the case of *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2915 (1991). The Court of Appeals for the Ninth Circuit, in the instant action, relied heavily on *Akins* in support of its position that parole laws are subject to ex post facto restrictions. The State of Georgia and the Georgia State Board of Pardons and Paroles believe that the analysis in *Akins*, upon which the *Morales* court relied, is incorrect, rendering the *Morales* decision erroneous.

SUMMARY OF THE ARGUMENT

A parole authority's determination to extend the time before it will hold subsequent parole hearings for an inmate is not subject to the restrictions of the ex post facto clause. The ex post facto provision applies to laws which prohibit retroactive enhancement of punishment. Laws establishing parole eligibility or parole consideration are not a part of the sentence imposed. Parole is merely an expectation that an inmate may receive the State's mercy by a reduction in his period of confinement. Respondent's judicially imposed punishment was not enhanced by a delay in his parole consideration date.

STATEMENT OF THE CASE

The facts and course of proceedings outlined in Petitioners' brief are incorporated by this reference.

ARGUMENT AND CITATION OF AUTHORITY

I. EXTENDING THE TIME BETWEEN PAROLE CONSIDERATIONS DOES NOT ENHANCE PUNISHMENT.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), this Court affirmed the longstanding definition of an ex post facto law as:

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or

> which deprives one charged with crime of any defense available according to law at the time when the act was committed. . . .

quoting Collins v. Youngblood, 497 U.S. at 42, *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). The *Collins* decision limited the application of the ex post facto clause and clarified previous decisions of the Court.

The Court rejected the contention that ex post facto analysis encompasses more than the long-established categories set forth in *Beazell*. Thus, it is no longer appropriate to inquire whether the law "alter[ed] the situation of a party to his disadvantage" or "deprived [him] of a substantial right." *Id.* at 47. *Collins* effectively provided the "clean slate" desired by the concurrence in *Weaver v. Graham*, 450 U.S. 24, 36 (1981) (Blackmun, J., concurring). Likewise, any focus on whether the law in question is procedural or substantive is irrelevant. The Court in *Collins* stated that the cases which have drawn a distinction between procedural and substantive laws have "imported confusion into the interpretation of the *ex post facto* Clause." *Id.* at 45.

The only proper inquiry, therefore, is whether the law falls within the "definition of crimes, defenses, or punishments, which is the concern of the *ex post facto* Clause." *Id.* at 51. The question in this case is whether the decision to extend the time between parole considerations makes more burdensome the punishment for a crime. *Id.* The answer is in the affirmative only if this Court concludes that the scheduling of parole hearings is synonymous with parole eligibility and that parole eligibility is an inherent part of punishment. The court below erred by basing its decision on these two false premises.

A. Parole Eligibility Is Not An Inherent Part Of The Sentence Imposed.

This Court has never held that eligibility for parole is a part of a prisoner's sentence subject to the prohibitions of the ex post facto clause. In light of *Collins*, which narrowly defines the parameters of the ex post facto clause, this Court should not now enlarge its scope to include parole eligibility. Parole is not a constitutional right; it is at most an expectation. *See, e.g., Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). Parole is the possibility that a prisoner's period of confinement may be reduced, an expectancy which may be denied for any constitutionally permissible reason.

Once sentence is imposed by the court, the outer limits of a prisoner's punishment are established. Parole provides a mechanism for conferring the grace of the state upon an inmate by reducing the amount of time to be served. The sentence, which is the judicially imposed punishment, and the parole, which is the mercy of the state bestowed upon the prisoner, are discrete functions performed by separate branches of state government. One is punishment which, once imposed, cannot be enhanced; the other is mercy which, under the Georgia scheme, may be granted or withheld so long as the reasons for denial are not constitutionally impermissible. *Sultenfuss v. Snow*, ___ F.3d ___, No. 91-8002 (11th Cir. decided Oct. 5, 1994) (en banc).

Denial of parole does not extend a sentence, nor does a sentence determine if or when an inmate will be released on parole. *Portley v. Grossman*, 444 U.S. 1311 (1980). The first premise of the decision below thus fails.

If the sentence is not extended then punishment is not enhanced. It follows that parole eligibility is not an inherent part of an inmate's sentence or punishment.

The reliance on *Warden v. Marrero*, 417 U.S. 653 (1974) by the court below for the proposition that parole is a part of Defendants' punishment is misplaced. In *Marrero*, this Court left open the question of whether parole eligibility is a part of punishment for purposes of the ex post facto clause. *Marrero*, 417 U.S. at 662. *Marrero* is limited to its facts. The decision was an interpretation of parole eligibility as defined by a federal statute and not an attempt to define parole eligibility for ex post facto purposes.

Collins instructs that the appropriate inquiry is whether the law falls within the definition of crimes, defenses, or punishments. Because parole eligibility does not increase the sentence it is not punishment.

B. A Change In The Frequency Of Parole Hearings Does Not Alter Parole Eligibility.

Hearing schedules do not extend the sentence of the inmate, but merely provide an orderly mechanism by which prisoners are periodically considered for parole. The analysis in *Portley v. Grossman*, 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice), is persuasive. In *Portley*, the Court held that "[parole] guidelines operate only to provide a framework for the [parole] Commission's exercise of its statutory discretion." *Id.* at 1312. The decision recognized that the denial of parole does not determine the length of the sentence, stating:

> [t]he terms of the sentence originally imposed have in no way been altered. Applicant cannot be held in confinement beyond the term imposed by the judge, and at the time of his sentence he knew that parole violations would put him at risk of serving the balance of his sentence in federal custody. The guidelines, therefore, neither deprive applicant of any pre-existing right nor enhance the punishment imposed.

Id. at 1312-13.

Respondent in this case was considered for parole but parole was denied for at least another three years. It is pure speculation that any requirement that Respondent be reconsidered in less than this three year period would result in an earlier release. The ex post facto clause does not prohibit changes relating to speculative benefits bestowed according to the unfettered grace of the state. Rather, the clause stands guard against changes which enhance or enlarge punishment concretely.

This Court has established the boundaries of the ex post facto clause and narrowed the terms of its application. That work should not be undone by applying the ex post facto prohibition to laws or practices twice removed from actual punishment; there is a sentence which determines time to serve, parole eligibility which provides a hope of parole, and parole consideration rules which provide a schedule for the exercise of the Board's discretion. At the very least, a distinction should be drawn, from a constitutional perspective, between the complete elimination of an opportunity for parole and an alteration

in the rules concerning when parole consideration will take place.

In the final analysis, however, neither parole eligibility nor parole consideration extends a prison sentence or removes any tangible benefit. Therefore, under *Collins*, the test of whether punishment is enhanced leads to the conclusion that alterations in parole consideration schedules do not violate the ex post facto clause.

CONCLUSION

For the foregoing reasons, the State of Georgia and the Georgia State Board of Pardons and Paroles respectfully request that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted,

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FOR ARGUMENT

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BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, D.C. PRISONERS' LEGAL SERVICES PROJECT, INC. AND CLARENDON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37.3 of this Court, National Legal Aid And Defender Association, D.C. Prisoners' Project, Inc. and Clarendon Foundation respectfully submit this brief *amici curiae* in support of Respondent. Written consent to the filing of this brief has been granted by counsel for all

parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

National Legal Aid And Defender Association is a not-for-profit organization whose members include the majority of public defender offices, coordinated assigned counsel systems and legal services agencies throughout the Nation. The organization also includes two thousand individual members. NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights.

D.C. Prisoners' Legal Services Project, Inc. is a private, non-profit, public interest law firm established to provide free legal services to prisoners confined to the District of Columbia correctional system. The Project represents prisoners in individual and class action litigation concerning conditions of confinement, parole, access to medical care and access to the courts.

Clarendon Foundation is a non-profit, non-partisan legal and educational foundation concerned with contemporary issues related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The foundation participates in various forums in cases where the resolution of constitutional issues will implicate the broad rule of law.

Because this case raises a fundamental constitutional question with significant ramifications for the public interest, *amici* believe that their perspective will complement the brief of Respondent and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

This case comes to the Court at a time when there are substantial legislative initiatives throughout the States, as well as at the Federal level, to tighten parole eligibility requirements. As an expression of the will of the people, a legislature's statutory response is delimited only by the requirements of the Constitution. But those requirements, regardless of the political or social climate of the day, must be strictly honored. The retrospective statute challenged in this case cannot stand because it violates one of the most basic of such limitations upon governmental action -- the proscription against ex post facto laws.

The court of appeals properly assessed the ex post facto nature of the statute in question, reasoning by straightforward logic that a law making parole hearings less accessible effectively increases a prisoner's sentence because a hearing is a condition of parole eligibility. Petitioners' rejoinder -- that there is not a causal relationship between the frequency of hearings and parole -- relies upon Petitioners' assessment of the probability of harm in this particular case. That approach is ill-conceived, however, because the analysis of an ex post facto law can coherently be undertaken only with reference to the class of individuals potentially subject to its adverse effects. Moreover, Petitioners' actual harm test is wholly inconsistent with the principles upon which the ex post facto ban was predicated. The guarantees of fair notice and governmental restraint -- critical features of the social compact -- would be emptied of any genuine reliability under Petitioners' approach. Finally, an actual harm test conflicts with decisions of the Court which make clear that the appropriate focus of an ex post facto challenge is the texts of the prior and subsequent laws, rather than the State's quantification of probability of actual harm in the aftermath of the retrospective law's application.

ARGUMENT

Article I of the Federal Constitution establishes that neither Congress nor any State shall pass any "ex post facto Law." *See* Art. I, Sec. 9, cl. 3; Art. I, Sec. 10, cl. 1. The ex post facto prohibition forbids Congress and the States from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24 (1981), *citing Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867). Alexander Hamilton regarded the ex post facto proscription as one of a triad of constitutional securities "perhaps greater ... to liberty and republicanism than any [provisions the Constitution] contains." THE FEDERALIST, No. 84.

In addition, the earliest authorities explain that the Clauses were aimed at a second concern -- that legislative enactments "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham, supra*, at 28-29, *citing Calder v. Bull*, 3 Dall. 386, 388 (1798); 1 W. Blackstone, COMMENTARIES 46. Implicit in the prohibition is the notion that individuals be punished only in accordance with standards of conduct they might have ascertained before acting.

James Madison viewed ex post facto laws as "contrary to the first principles of the social compact and to every principle of sound legislation," warning that "[o]ne legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." THE FEDERALIST, No. 44. The ban restricts governmental power by restraining arbitrary and potentially vindictive legislation. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Thus, a core meaning of the ex post facto prohibition is a concern for "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed

when the crime was consummated." *Weaver*, 450 U.S. at 30.

In light of these principles, this Court in *Weaver, supra*, said that two critical elements must be present for a criminal or penal law to be ex post facto: "It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29, *citing Lindsey v. Washington*, 301 U.S. 397, 401(1937). Further, the Court has held that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

Viewed in the context of these legal parameters, it is clear *(1)* that the Ninth Circuit's analysis of the effect of the 1981 amendment was sound, and *(2)* that Petitioners' actual harm test would do violence to the principles underlying the ex post facto proscriptions.

I. THE COURT OF APPEALS PROPERLY ANALYZED THE UNCONSTITUTIONAL EFFECT OF THE 1981 AMENDMENT.

1. In this case, the Ninth Circuit ruled that the retrospective reduction in the frequency of parole eligibility hearings violated the proscriptions against ex post facto penalties. "By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed." *Morales v. Calif. Dept. of Corrections*, 16 F.3d. 1001, 1004 (1994). The court's reasoning was straightforward: "Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility.....Accordingly, any retrospective law

making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause. We base this conclusion on the Supreme Court's observation that the denial of parole is a part of a defendant's punishment. *Warden v. Marrero*, 417 U.S. 653, 662 (1974)." *Ibid.*

In rejoinder, Petitioners assert that the Ninth Circuit's rationale is a "flawed syllogism." Petitioners' Brief at 12. They argue that the denial of the opportunity for parole in this case was not substantial within the meaning of *Weaver*, Petitioners' Brief at 11-12. The essence of Petitioners' argument is that a "positive showing of detriment to the inmate," *id.* at 19, cannot be made on the facts of this case because "[i]t is inconceivable that any reasonable person could find that respondent would be ready for parole in the year immediately following the completion of his minimum term of imprisonment given the record in this case." *Id.* at 22. "The Board's findings, in light of the facts before it as to respondent's crimes and personality, are unimpeachable. Therefore, respondent was not detrimentally affected by postponement because he had no 'reasonable' expectation that the next annual hearings, were they to be held, would result in the granting of parole." *Ibid.* Petitioners thereby advocate an *actual harm* test which would require "a positive showing of detriment to the inmate," Petitioners' Brief at 19, in order to meet the *Weaver* standard.

2. Petitioners' counter-argument to the Ninth Circuit's rationale is unsound. Petitioners' criticism of the Ninth Circuit's reasoning is directed toward that court's employment of the concept of causation in the context of assessment of harm. The Ninth Circuit argued, in essence, that inasmuch as a parole hearing is a condition for being paroled, decreasing the frequency of parole hearings decreases the chances of being paroled. If the chances of being paroled are decreased, the inmate consequently suffers an increase in punishment, constituting a cognizable harm under the *Weaver* test. Petitioners challenge the part of this argument

which sets forth a causal relationship between a parole hearing and the probability of an inmate's being paroled. They attack this as a "flawed syllogism" on the ground that "[t]here is no inherent relation between the number of hearings and parole because frequency of appearance does not imply improvement of character." Petitioners' Brief at 21.

Petitioners further claim that the change in the law is not substantive because in order to cancel parole hearings that would have been held under the prior law, the parole board must determine that there is no "reasonable expectation" that the inmate would meet parole eligibility requirements. *Ibid.*

The error in Petitioners' argument can be seen by considering more carefully the nature of the causal connection identified by the court of appeals. This Court has defined a cognizable "harm" as a disadvantage flowing from a retrospective application of a law. *Weaver*, 450 U.S. at 29. More formally, such a harm can be said to occur when a condition is introduced which brings about negative consequences. One way of viewing this relationship -- the way Petitioner's view it -- would be to think of causality in terms of necessary or sufficient conditions for the occurrence of some further event -- here, the proposition that decreasing the frequency of eligibility hearings for Mr. Morales is a sufficient cause of a decrease in his chances of parole. But causation in this context must be thought of in a different sense. For example, smoking is a cause of cancer, but not a determinative cause because some people who smoke never contract cancer. Rather, the cause is merely probabilistic: Among the class of individuals who smoke, the chances of any one of them contracting cancer is higher than it is for the class of non-smokers.

Likewise, if the new law detrimentally affects the timing of parole for some inmates, it can be said to be a

cause of that outcome, in the probabilistic sense. It may be the case, as Petitioners claim, that Mr. Morales would not be affected by the change in this way. But that is not relevant because the validity of a causal dynamic in the sense in which the Ninth Circuit applied it only lies with reference to a general class of individuals. This is wholly appropriate because, as discussed below, that is the only level at which analysis of an ex post facto challenge can be addressed coherently. It is thus non-responsive for Petitioners to counter with an argument having to do with the degree of likelihood that Morales himself will be disadvantaged by the retrospective law.

This is plain when one considers that the law at the time of Morales' conviction and sentencing provided that he could be considered for a parole hearing at a certain juncture. In the view of the then applicable law, those in the class of which Morales is a member would be eligible for parole review according to how the legislature laid out that portion of the statute. Petitioners may argue -- even reasonably argue -- that the possibility of Morales benefitting from the timetable of that law is slim. The fact remains, however, that the law structured formerly so as to countenance that possibility, has now been changed in a way that diminishes the possibility. Because the "denial of parole is a part of a defendant's punishment," 16 F.3d at 1004, the later law is more onerous. As this Court has said: "The presence or absence of an affirmative, enforceable right is not relevant ... to the ex post facto prohibition ... Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint ... Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver*, 450 U.S.at 29.

II. PETITIONERS' ACTUAL HARM TEST IS INCONSISTENT WITH THE PRINCIPLES UNDERLYING THE BAN AGAINST EX POST FACTO LAWS.

1. The assessment of Mr. Morales' worthiness for parole is obviously a proper consideration for the parole board whenever Mr. Morales becomes eligible for parole review. But it is manifestly not a valid factor in determining whether the retrospective law disadvantages him. For this would put the State in the position of attempting to quantify empirically the likelihood of harm which might fall upon an inmate as a predicate for assessing the constitutionality of the retrospective law. This would be an unlawful procedure for several reasons.

First, the task of quantifying the likelihood of harm would occur not with enactment of the law by the legislature, but by definition, at a time *after* the date of the offense. The legislators who had authored the law would have no knowledge of its actual impact in a given case. Petitioners' proposal would thereby transform the parole board into a quasi-legislative body whose actual harm assessment had the force of prior law. That state of affairs would be no different in practical effect than if the legislature had written a subsequent law which expressly dictated that "Jose Ramon Morales" should not be paroled because of a determination that there is a "reasonable expectation" any earlier parole eligibility would be denied. That would clearly be contrary to "every principle of sound legislation," THE FEDERALIST, No. 44 (J. Madison). Moreover, it is well-established that one of the purposes of the ex post facto prohibition is to "uphold the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver*, 450 U.S. at n. 10.

Moreover, nothing in the text of the Ex Post Facto Clauses suggests that a quantification of the likelihood of harm is a threshold step in applying the ex post facto proscriptions. The reason should be obvious: The question of the effect of the new law on the timing of Morales' parole eligibility is only proper in the context of a comparison of the two laws. It is *laws themselves* -- the legislative acts -- which are the subject of the Ex Post Facto Clauses. *See* Art. I, Sec. 9, cl. 3; Art. I, Sec. 10, cl. 1. Institutional mechanisms such as parole boards, which are susceptible to changing assessments, are plainly outside the scope of the text. To reiterate, while the assessments of parole boards are fitting in the forum of parole eligibility review, they are utterly inappropriate for testing the constitutionality of a law. Thus, the only proper approach for evaluating an ex post facto challenge is a comparison of the texts of the prior and subsequent laws. As this Court said in *Weaver*, the proper focus of whether a retrospective statute is more onerous "*looks to the challenged provision*, and not to any special circumstances that may mitigate its effect on the particular individual." *Id.* at 33 (emphasis added).[1]

That a comparison of the texts of the respective laws is the only valid procedure for testing an ex post facto challenge, follows from the phrasing of the ex post facto provisos in the Constitution, which *by their terms* proscribe *the passage* of such laws. *See* Art. I, Sec. 9, cl. 3; Art. I. Sec. 10, cl. 1. It is at the level of the acts of legislatures that the ban focuses. Concern for "the lack of fair notice and governmental restraint" -- limitations which go to the

1 Petitioners' reliance upon *Weaver* to support its actual harm test is misplaced. *Weaver* did involve a situation where the offenders would be subject to "actual harm" by retroactive application of the sentencing guidelines to them. But nowhere in *Weaver* does the Court suggest that this is the type of harm necessary to meet its test. Indeed, *Weaver* implicitly endorses a comparative analysis. *See Weaver*, 450 U.S. at 38 (Rehnquist, C.J., concurring in the judgment).

nature of legislative actions -- are the core principles from which the *Weaver* test derives. *Miller v. Florida*, 482 U.S. 423, 430 (1987). These are notions which courts can only explore in an *a priori* way by comparing the texts of two laws. An actual, quantifiable proof of harm is no more appropriate in this context, than would be a requirement that an inmate prove he "personally" lacked "fair notice" of the more onerous penalty. These are judgments which can only be made by comparing the two laws.

Furthermore, nothing in the Court's prior pronouncements concerning the meaning or the underlying principles of the ex post facto ban suggests that a calculation of likelihood of harm is a legitimate factor in the equation. Marking bounds which will affect crucial liberty interests by resorting to a formula of "reasonable expectations," *see* Petitioners' Brief at 21, is grossly imprecise, even if it were procedurally valid. Indeed, the fact that the "reasonable expectation" approach is the best the California legislature could design is, itself, strong evidence that such an assessment is dangerously vague.[2]

The circumstances of the instant case require special scrutiny because the change in the law at issue is the plain product of a current political climate in which harsher sentencing and stricter parole requirements are gaining currency. Properly effectuated, of course, that result is a wholly legitimate exercise of the legislature. But improperly carried out, it is a grave constitutional violation. Madison's characterization of ex post facto violations as "contrary to

2 The feasibility of an actual harm test may be further undermined by the rule of lenity, which "prescribes the result when a criminal statute is ambiguous: the more lenient interpretation must prevail." *U.S. v. R.L.C.*, 112 S.Ct. 1329, 1339(1992)(Scalia, J., concurring in the judgment). The very notion that the benefit of doubt must flow to the defendant in cases where a statute is unclear suggests the overriding primacy of the text itself in matters affecting the potential degree of punishment.

the first principles of the social compact," THE FEDERALIST, No. 44, is particularly instructive on this score. The social compact -- as reflected in the terms of our Federal charter -- fixes the bounds of proper governmental action in consideration of the citizenry's submission to legislative enactments. For the compact to be valid, the members of society must be able to rely upon the legislature's respectful adherence to those bounds. The quintessential example of a breach of that responsibility is legislative action which violates a fixed constitutional principle because of a change in political wind or social sentiment. It appears that precisely this type of breach has occurred here.

2. Ironically, Petitioners acknowledge by implication the impropriety of their actual harm argument. Relying upon the Ninth Circuit's ruling in *Powell v. Ducharme*, 998 F.2d 710 (1993), Petitioners conclude that "speculation cannot be used to determine whether a new law prejudices an inmate." Petitioners' Brief at n. 7. The logical upshot of this position is that the "reasonable expectation" assessment of a parole board -- itself an inherently speculative endeavor -- should not be part of the ex post facto analysis. That analysis should focus on a comparison of the texts of the laws in question.

Petitioners' exclusive focus on the degree of likelihood of parole is at odds with this Court's seminal decision in *Lindsey v. Washington*, 301 U.S. 397 (1937). In *Lindsey*, the law in effect at the time the crime was committed provided for a maximum sentence of 15 years, and a minimum sentence of not less than six months. At the time Lindsey was sentenced, the law had been changed to provide for a mandatory 15-year sentence. To resolve the question whether the later law was more onerous than the former, the Court compared the "practical operation of the two statutes as applied to petitioner's offense." *Id.* at 400. Although it was true, as the State contended, that Lindsey might have been sentenced to fifteen years under the prior

law, the Court stressed that the "ex post facto clause looks to the standard of punishment prescribed by the statute, rather than to the sentence actually imposed." *Id.* at 401. "[A]n increase in the possible penalty is ex post facto regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the statute is more severe than that of the earlier. *Ibid.* Thus, the Court held that the removal of the possibility of a sentence of less than fifteen years operated to Lindsey's detriment because the degree of punishment required under the new statute was more onerous than under the previous law.

Lindsey establishes that the proper analytical context for an ex post facto challenge is a comparison of the texts of the prior and later laws. *See also Weaver*, 450 U.S. at 30 ("When a court engages in ex post facto analysis, which is concerned *solely* with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested rights....The critical question is whether the law changes *the legal consequences* of acts completed before its effective date")(emphasis added). The matter of detriment or harm to the challenger is assessed in that context only. A divergent procedure of the sort advocated by Petitioners, which calls for speculative quantification of the probability of "actual harm," is inconsistent with *Lindsey* and must be rejected.

There is at least one other sense in which Petitioners' argument for an actual harm test is analytically deficient. At the most fundamental level, the argument appears to beg the basic question. Once a parole board is satisfied that the likelihood of harm has been adequately quantified so as to rule out a concern for actual harm, the inquiry ends. This result, however, conflicts with the "axiom[ ] that [a subsequent law] must be more onerous than the prior law." *Dobbert*, 432 U.S. at 29. For it may be the case that a law

causes actual harm but also has ameliorative qualities outweighing the harm, and thus be constitutional; or a law may cause actual harm, have ameliorative qualities, but still be more onerous when examined *in toto* -- and therefore be unconstitutional. *See Weaver*, 450 U.S. at 38 (Rehnquist, C.J., concurring in the judgment). Because Petitioners' test relying on an assessment of actual harm bypasses the required comparison and moves immediately to a legal conclusion -- the conclusion which is supposed to be the result of first comparing the two laws in question -- it must be rejected.

* * *

For these reasons, Petitioners' criticism of the Ninth Circuit's holding is ill-founded. Moreover, as shown, Petitioners' actual harm test is inconsistent with the underlying principles of the ex post facto proscription and is analytically deficient.

CONCLUSION

Accordingly, the Court should affirm the decision of the Ninth Circuit.

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